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Ontario

ROYAL COMMISSION OF INQUIRY INTO CERTAIN
DEATHS AT THE HOSPITAL FOR SICK CHILDREN AND
RELATED MATTERS.

Hearing held
8th floor
180 Dundas Street West
Toronto, Ontario

The Honourable Mr. Justice S.G.M. Grange

Commissioner

P.S.A. Lamek, Q.C.

Counsel

E.A. Cronk

Associate Counsel

Thomas Millar

Administrator

Transcript of evidence
for

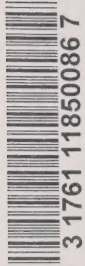
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Hearing held on the 8th Floor,
180 Dundas Street West, Toronto,
Ontario, on Wednesday, the 9th
day of May, 1984.

- - - -

THE HONOURABLE MR. JUSTICE S.G.M. GRANGE - Commissioner
THOMAS MILLAR - Administrator
MURRAY R. ELLIOT - Registrar

- - - -

APPEARANCES:

P.S.A. LAMEK, Q.C.)	Commission Counsel
E. CRONK)	
D. HUNT)	Counsel for the
L. CECCHETTO)	Attorney General and
		Solicitor General of
		Ontario (Crown
		Attorneys and Coroner's
		Office)
I.G. SCOTT, Q.C.)	Counsel for The
I. J. ROLAND)	Hospital for Sick
M. THOMSON)	Children
R. BATTY)	
B. PERCIVAL, Q.C.)	Counsel for The
D. YOUNG)	Metropolitan Toronto
		Police
K. CHOWN		Counsel for numerous
		Doctors at The
		Hospital for Sick
		Children



APPEARANCES (Continued):

E. MCINTYRE	Counsel for the Registered Nurses' Association of Ontario and 35 Registered Nurses at The Hospital for Sick Children
J. SOPINKA, Q.C.) D. BROWN)	Counsel for Susan Nelles - Nurse
P. RAE	Counsel for Phyllis Trayner - Nurse
B. KNAZAN	Counsel for Mrs. M. Christie - R.N.A.
S. LABOW	Counsel for Mr. & Mrs. Gosselin, Mr. & Mrs. Gionas, Mr. & Mrs. Inwood, Mr. & Mrs. Turner, Mr. & Mrs. Lutes and Mr. & Mrs. Murphy (parents of deceased children)
F. J. SHANAHAN	Counsel for Mr. & Mrs. Dominic Lombardo (parents of deceased child Stephanie Lombardo) and Heather Dawson (mother of deceased child Amber Dawson)
W.W. TOBIAS	Counsel for Mr. & Mrs. Hines (parents of deceased child Jordan Hines)
J. SHINEHOFT	Counsel for Lorie Pacsai and Kevin Garnet (parents of deceased child Kevin Pacsai)

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E R R A T A

Volume 141

P. 2480, line 13: "with Frank" should read:

"was frank"

P. 2554, line 12: "Mangaro" should read:

"Mangera"



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9 May

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1
2 --- Upon commencing at 10:00 a.m.

3 THE COMMISSIONER: I'm sure that
4 everybody knows what the problem is, but to give you
5 some idea of what I am faced with I will just briefly
6 describe it.

7 The Order in Council requires me,
8 without expressing any conclusionable law regarding
9 the civil or criminal responsibility in Phase II, to
10 ~~investigate~~ into, determine and report on the circumstances
11 surrounding the investigation, institution and
12 prosecution of charges arising out of the deaths of
13 the above mentioned four infants. Those four infants
14 are, of course, Janice Estrella, Kevin Pacsai, Allana
15 Miller and Justin Cook and the prosecution they
16 refer to is the prosecution of Susan Nelles that
17 terminated with the preliminary enquiry.

18 Now, the problem arises out of the
19 Court of Appeal decision and, in my view, particularly
20 by the part that starts at the bottom of page 14, but
21 the Order in Council specifically limits the
22 Commissioner by forbidding him to express any
23 conclusion of law regarding civil or criminal responsibility
24 and then it says for a death or the deaths, because
25 they were there dealing with Phase I.

In our opinion such a conclusion may



1
2 be expressed by findings of fact, which without
3 more when found against a named person constituted
4 a conclusion of criminal or civil responsibility.

5 Now, I emphasize the word "civil"
6 because in Phase II there is very little likelihood
7 of criminal responsibility, but there is a good deal
8 of ~~the~~ likelihood of civil responsibility.

9 The question, as I posed it, is found
10 in the transcript on the 3rd of May, Volume 140, at
11 ~~page 2291~~

12 "Can I, in the light of the recent
13 Decision of the Court of Appeal,
14 receive evidence or submissions or
15 report on the propriety or otherwise
16 of the conduct of any person in the
17 course of the investigation and
18 prosecution."

19 Now, you will note that I have used
20 or made a reference to evidence. It seems to me at
21 the moment -- I haven't thought it thoroughly
22 through -- that there is some justification in Phase
23 I for receiving evidence that pointed to a perpetrator,
24 because it might be also evidence as to the cause of
25 death.

It is my present view that I can see no



1
2 justification for receiving evidence on something
3 upon which I cannot report in Phase II.

4 Now, I must say that I have no firm
5 view on just what the position is, but I certainly
6 have a firm view, and I would be happy to be dissuaded
7 from on the question as to whether or not we will
8 receive evidence if, in fact, I cannot report upon
9 the question and that is going to make it, of course,
10 extremely difficult and very limited if I can't report
11 on the propriety of anybody's conduct.

12 Now, I repeat again that I don't want
13 to start Phase II until the matter is solved and that
14 is why I want to take the first step in solving it
15 today. If counsel are of the view that I cannot
16 report on the propriety of anybody's conduct, I
17 would like to have their recommendations for a
18 solution if they think a solution is appropriate.

19 Now, I intend to hear from everybody
20 if they want to make representations, regardless
21 of whether they will obtain or even seeking standing
22 in Phase II. I suggest only for convenience that
23 we hear from Mr. Sopinka first, followed by Mr.
24 Hunt, Mr. Percival, Mr. Scott and then anybody else
25 who wants to address the matter I will hear about it.

I will ask Mr. Lamek at the end to



1
2 resolve the problem. I think he will probably
3 decline the offer, but I will at least give him the
4 invitation. If you have any other order that you
5 would like to go in, of course, it is perfectly
6 satisfactory with me. If not, Mr. Sopinka, do you
7 want to tell me what your views are.

8 MR. SOPINKA: Thank you, Mr. Commissioner.
9 First of all I would like to thank you for facilitating
10 attendance here this morning. They say this is a
11 commission of firsts. It is the first time a Trial
12 Judge has advised me that an adjournment, which I had
13 not requested, was granted.

14 Mr. Commissioner, the Order in Council,
15 in my submission, authorizes two distinct enquiries
16 to which fundamentally different principles apply.
17 We call them Phase I and Phase II. Phase I, of course,
18 is in paragraph 3, Phase II in paragraph 4. The first
19 Phase was how and by what means the children came to
20 their deaths. The second Phase, the circumstances
21 surrounding the investigation, institution and
22 prosecution of Susan Nelles. The second Phase is an
23 enquiry into the administration of justice in the
24 Province. This is the enquiry that is described in
25 the second recital or is foreshadowed in the second
recital, whereas concern has been expressed concerning



A5 1
2 the functioning of the justice system in respect of
3 the instituting and prosecution of charges in
4 relation to the said deaths.

5 The first Phase is the type of enquiry
6 that potentially could become an extension of a
7 police investigation or a prosecution, both of which
8 are under Federal jurisdiction.

9 With respect to that type of enquiry
10 there is a constitutional impediment. The decision
11 of the Court of Appeal is that that potential of
12 transgressing on Federal jurisdiction would be
13 realized if names were named. The thing that saves
14 the first Phase of the enquiry from being a transgression
15 on Federal jurisdiction is that names cannot be named.
16 There is no constitutional impediment with respect
17 to the first type of enquiry.

18 This dichotomy and the types of enquiry
19 was explained by Mr. Justice Estey in the Keable Case.
20 It was followed by Mr. Justice Martin in Hoffman-LaRoche.
21 That was the case that was extensively referred to in
22 the Court of Appeal and I am going to refer the
23 Court of Appeal Judgment in a moment.

24 In the Keable enquiry at page 190 Mr.
25 Justice Estey said this, this is a passage that
has been quoted to you before in these proceedings.



... that.

The first category may involve the investigation of crime generally and may be undertaken by the invocation of Provincial enquiry Statutes."

That is, there is no constitutional impediment.

"The second category entails the investigation of specific crime, the



1
2 procedure for which has been established
3 by Parliament and may not be
4 circumvented by Provincial action
5 under the general enquiry legislation
6 any more than the substantive principles
7 of criminal law may be so circumvented."

8
9 crystal clear in the Court of Appeal Judgment
10 they were dealing with Phase I only and they were
11 directing their minds to the possibility -- this was
12 the argument in the Court of Appeal, that if names
13 were named there would be a constitutional impediment
14 because then it would fall into the category mentioned
15 by Mr. Justice Estey in this Judgment.

16
17 Now, can I turn to the Court of Appeal
18 Judgment and I know we have all read it. In order
19 to illustrate that this is what they did and I want
20 to read it again at page 9, starting at the top of
21 the page:

22 "The statement of the Attorney
23 General as to the limitation on the
24 scope of a public enquiry was correct
25 and it is important. A public enquiry
is not the means by which investigations
are carried out with respect to the
commission of a particular crime or



1
2 using his words, "deaths which are
3 thought to have been the result of
4 deliberate criminal acts by a person or
5 persons unknown.

6 Such an enquiry is a coercive procedure
7 and is quite incompatible with our
8 notion of justice in the investigation
9 of a particular crime and the determination
10 of actual or probable criminal or civil
11 responsibility."

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2 Now that term coercive procedure is
3 taken right from Hoffman LaRoche because what Mr.
4 Justice Martin said in that case following what Mr.
5 Justice Estey said, is if you have an inquiry that is
6 really an investigation of crime and suspects are
7 asked to testify, then you really have a police
8 investigation with the added element that people have
9 to talk to the police, and that the province cannot

10 Now then he quotes Hoffman LaRoche which
11 has much the same effect as the judgement of Mr.
12 Justice Estey. The Court of Appeal points out that
13 this was approved by the Supreme Court of Canada in
14 the Attorney General of Canada versus the Canadian
15 National Transportation, and then the court goes on
16 and this is the key passage:

17 "While the constitutional validity of
18 the Order in Council is not an issue in
19 this court..."

20 THE COMMISSIONER: I think somehow I thought
21 it was but I am wrong I see.

22 MR. SOPINKA: No it wasn't. It was
23 never argued that the Order in Council was unconstitutional.
24 The argument was --

25 THE COMMISSIONER: It certainly was in



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document that they gave to me, it certainly was suggested but I guess it wasn't argued.

MR. SOPINKA: Well it was argued this that the Order in Council should be so interpreted to conform with the constitutional limitations in the province and that is what they did. There was an alternative argument I think you are right, there was an alternative argument that if the interpretation contended for by Mr. Lamek was correct then it was unconstitutional. That may not be quite right but this is the Court of Appeal and I don't look a gift horse in the mouth:

"It may be that it would have been vulnerable to question had the limitation not been imposed on the Commissioner that he not express any conclusion as to the civil or criminal responsibility. This inquiry should not be permitted to become that which it could have not legally been constituted to be, an inquiry to determine who was civilly or criminally responsible for the death of the child or in the circumstances of this case in lay language simply: Who killed



1
2 the children?"

3 It is clear that they are limiting
4 themselves to Phase I, who killed the children and
5 that has nothing to do with Phase II. All the other
6 language talks about an inquiry of the first type.

7 THE COMMISSIONER: Supposing the only
8 question had been civil responsibility. Everywhere
9 in the judgement they say right there, they say
10 civilly or criminally responsible. The province
11 would have all the constitutional power in the world
12 to do that, they have used civil there, and they have
13 used it again in the passage that I read. Yet how
14 can I determine, how can I read the judgement of the
15 Court of Appeal otherwise if I can't deal with the
16 civil responsibility.

17 MR. SOPINKA: They make it very clear
18 in the passage that I read that they are dealing with
19 Phase I and they are two different types of inquiry.

20 THE COMMISSIONER: They say civilly
21 or criminally responsible. If they just said criminally
22 responsible I can understand that, but they have
23 said civilly or criminally and they go back on it on
24 page 15.

25 MR. SOPINKA: Civilly responsible in
a type of inquiry that is designed to determine the



1
2 responsibility with respect to a particular act. If
3 you look at the statement where they use, "Civilly
4 responsible" on page 9, can you possibly suggest
5 they are talking about Phase II.

6 THE COMMISSIONER: I don't think they
7 Phase II was not before them.

8 MR. SOPINKA: Yes.

9 THE COMMISSIONER: But I have to
10 follow the Court of Appeal.

11 MR. SOPINKA: Anything they said about
12 Phase II then that might bear on it is obiter.

13 THE COMMISSIONER: That may well be
14 obiter but this matter may well go back to them and
15 then it won't be obiter.

16 MR. SOPINKA: That is correct. It is
17 a well known principal that any decision has to be
18 constrained by the circumstances that were before
19 the court.

20 THE COMMISSIONER: You see the similarity,
21 we are dealing with exactly the same Order in Council,
22 we are dealing with exactly the same words, that is
23 without the precise words I keep forgetting:

24 "... without expressing any conclusion
25 of law regarding civil or criminal
responsibility".



1
2 Those were the words that they find
3 that I cannot name names.

4 MR. SOPINKA: Yes, but you have to
5 look at the context with respect.

6 THE COMMISSIONER: Yes. All right.

7 MR. SOPINKA: General words like that.
8 I mean it so happens what are two distinct inquiries
9 are contained in the same document, but those general
10 words without determining criminal or civil responsibility
11 yield different interpretations if you are dealing
12 with an inquiry in respect to which there is a
13 constitutional impediment. So they have to be
14 interpreted so as to keep the province within its
15 limits. But they do not demand the same interpretation
16 when you are dealing with an inquiry that has no
17 constitutional limits, and the type of inquiry into
18 the Administration of Justice which has been conducted
19 in this province on a number of occasions and in other
20 provinces. DiIorio was in inquiry into the conduct
21 of Quebec Police. The Supreme Court of Canada
22 expressly approved it, and it named names. Now I have
23 some examples here of inquiries in this province.

24 The inquiry by the Royal Commission
25 on conduct of Police Forces at Fort Erie and that was
conducted by Mr. John A. Pringle, and just as an



Example on page 67 in comments and recommendations

"Marijuana in its usual dry bulk form is too bulky to conceal on the body. The instructions issued to the two policewoman by Sergeant Millejours lacked judgement. He placed the two policewomen in a position of conducting searches of persons innocent of any wrong doing. At the time of such order being given and subsequently Inspector Parkhouse and Sergeant Millejours had no reasonable grounds to suspect the females were concealing heroin on their persons."

THE COMMISSIONER: I don't want you to think that I am prejudging this matter in any way, because I certainly have no idea what the conclusion is that will be reached.

DM/hr

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2 Did any of these inquiries that you refer to have
3 these fatal words in them about criminal or civil
4 responsibility.

5 MR. SOPINKA: No.

6 THE COMMISSIONER: You see these were
7 stuck in by the Court of Appeal and they are taken
8 to guide the whole process. If they are there, and
9 if they guide the whole process it may well be that
10 this inquiry is in fact limited more than any other
inquiry.

11 MR. SOPINKA: Well the Order in
12 Council may have been different, but you have to
13 bear in mind the Attorney General in announcing this
14 inquiry when he said that this inquiry is unprecedented
15 he was undoubtedly referring to the first Phase
16 because the second Phase was a garden variety type
17 of inquiry. So all the precautions that were imposed
were with respect to the first type of inquiry.

18 THE COMMISSIONER: All they had to do
19 was put that limitation, incorporate it in paragraph
20 three, but instead of that he incorporated it in the
21 whole Order in Council, the result is that it applies
to four as well.

22 MR. SOPINKA: I agree that it could have
23 been more artfully drafted. My submission is that if you
24
25



1
2 accept my submissions, and I am going to make an
3 alternative submission as to how far you can go
4 without naming names, then it should go back to
5 the Attorney General for clarification, because it
6 would be preposterous in my submission if we are not
7 able to comment on the functioning of the justice
8 system, you are not entitled to do anything. The
recital says:

9 "Whereas concern has been expressed
10 concerning the functioning of the
11 justice system..."

12 How can you possibly allay that concern
13 which obviously is the object of the Order in Council
14 if you can't say you did what.

15 THE COMMISSIONER: That is my problem.
16 You could not have expressed it better.

17 MR. SOPINKA: Ask the Attorney General,
18 he gave you the job?
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THE COMMISSIONER: Yes. All right.

MR. SOPINKA: And of course every one of these Inquiries, the Royal Commission into Metropolitan Police Practices name names, the Grant Commission name names and it is certainly clear that that is a common type of inquiry in this Province and that was what the Attorney General intended and in my submission the existence of those inquiries are relevant to the interpretation of this Order in Council because they were inquiries into the functioning of the justice system, and that is what Phase II is, an inquiry into the functioning of the justice system.

THE COMMISSIONER: Yes.

MR. SOPINKA: Well now, if I'm wrong and the same principles apply to Phase II as applied to Phase I, as has been suggested, then I submit the situation is as follows:

In Phase I you were to determine how and by what means, et cetera, and we had an argument in the Court of Appeal and the Court of Appeal was obviously influenced by the fact, and then argument was made to this effect, that a very legitimate object of this Inquiry can be achieved by limiting the answer to that question to accidental or otherwise without naming names.



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Now, in Phase II you were to determine the circumstances with respect to the investigation, institution and prosecution of Susan Nelles. Without naming names the Commission can and should determine (a) whether the charges were adequately and properly investigated.

THE COMMISSIONER: And I don't even mention the names of the investigators?

MR. SOPINKA: Well, if that is the limitation, you don't mention any names.

THE COMMISSIONER: And does that mean that no evidence is ever given of a name. What do we do when we have to swear in a witness? I am not being facetious, there is a real problem about not naming names.

MR. SOPINKA: Wait a second. We had that same problem in Phase I after the Court of Appeal said you couldn't name names, and I didn't hear anybody changing their mode of examination. Phyllis Trayner was here --

THE COMMISSIONER: No, no, I understand that, but part of that was we had gone so far and everybody told me I was to continue in the same method, and I gave in. Frankly, I am not at all sure that we should proceed with any evidence and allow people,



1
2 because this has become a very, very public inquiry,
3 I'm sorry to say. It started off as a public inquiry,
4 then it became a very public inquiry and now it has
5 become a very, very public inquiry. Every time
6 somebody comes in, if I permit cross-examination of
7 that person saying why did you do this, why didn't you
8 do that, why didn't you do the other thing, all of
9 that will be all over the papers; and I can't
10 say whether it was proper for him to do it or improper
11 for him to do it.

12 MR. SOPINKA: That's right.

13 THE COMMISSIONER: The whole thing
14 strikes me as wildly unfair.

15 MR. SOPINKA: We addressed this in
16 Phase I. The question of leading evidence that in-
17 extricably had in it the identity of the person. As
18 I understood it at that time when I was arguing it
19 in Phase I, you said, and I think quite properly, in
20 some cases you can't do it, you take every safeguard
21 to prevent it but you can't if it is a choice between
22 excluding the evidence and safeguarding identity, the
23 option has to be in favour of getting the evidence.
24 All safeguards can be made to prevent identity. But
25 it is not that much of a problem, everybody knows who
investigated these charges, everybody knows who



1
2 conducted the prosecution. We are not going to be
3 revealing anything. It is not necessary to name
4 anybody.

5 Now, just to answer your question. In
6 Phase I, I take it you had the same respect for the
7 decision of the Court of Appeal as you have now and
8 undoubtedly that questioning was being conducted in
9 accordance with the judgment of the Court of Appeal.
10 You can't say the Court of Appeal judgment governs
11 Phase II in some aspects but not in all aspects.

12 THE COMMISSIONER: Well, I repeat
13 what I said before. There is an object and
14 the object is to find out the cause of death of these
15 children, and I can still do that and I was persuaded
16 that the evidence went, however little to that
17 subject, it went to it. If somebody could demonstrate
18 clearly in Phase II even at the end - Phase I rather -
19 even at the very end, after the Court of Appeal's
20 judgment had come out, that any of the questions that
21 were put to Mrs. Trayner, or for that matter to any of
22 the more recent witnesses had nothing whatever to do
23 with the cause of death, only as to the identity of
24 the person who caused the death, and then I would have
25 ruled it out.

Now, here's the problem. If any



question has **to do not** with the circumstances but as to the conduct of the people who investigated or prosecuted Susan Nelles, then is it even receivable?

MR. SOPINKA: Oh, the conduct, no. If it only goes to identity, then it shouldn't be received on this alternative argument. But obviously you ~~can't~~ investigate circumstances without investigating conduct, it's the same as it was in Phase I.

THE COMMISSIONER: Well, how would I write a report? How would I write a report? Surely I have to name the police who did the investigation. I have to name - there are only two Crown Attorneys involved, I have to name them.

MR. SOPINKA: Well, call them A and B.

THE COMMISSIONER: Well, it's fraudulent, that's all.

MR. SOPINKA: You are demonstrating, in my submission, that in Phase II you can name names but if you are going to restrict yourself, I am telling you if you are going to feel constrained by that artificial limitation in Phase II, then you can report on the circumstances of the investigation. You can say, for instance, I think that the police, and this is probably what you will say, were precipitous in laying the charges after only investigating for



1
2 ~~Two~~ days. We have been at this now for over a year
3 and I still haven't been able to come to any con-
4 clusion as to any evidence and, therefore, I think
5 those charges were precipitously laid. Why do you
6 have to name any names? If you feel constrained to
7 ~~make~~ designations, you can say Officer A or Officer B.

7 THE COMMISSIONER: All right.

8 MR. SOPINKA: Secondly, I submit you
9 can report on whether the charges ought to have been
10 laid and, of course, I am just giving the conclusions
11 that you can reach, that can be elaborated on extens-
12 ively based on the evidence.

12 (c) whether the preliminary hearing
13 was properly conducted and should have continued.

14 And then recommendations, including
15 any recommendations with respect to compensation to
16 Susan Nelles.

17 Now, the fact, I submit, that the
18 Attorney General --

19 THE COMMISSIONER: That is a throw-away
20 line I hope, because if I can't determine who was
21 responsible, how can I then say that Susan Nelles should
22 be compensated?

23 MR. SOPINKA: No, no. In Phase II,
24 you determine if the charges were improperly laid, then
25



that may very well be a basis for recommending compensation.

THE COMMISSIONER: Oh, I see.

MR. SOPINKA: And that was obviously the view of the Attorney General as to how this Commission was to work in this phase, because on August 20, 1983, he said:

"My view is if the Royal Commission finds that Miss Nelles was treated improperly by the police or by Crown Counsel, then of course compensation would be seriously considered."

I can provide you with a copy of this statement. I have checked it with the reporter and it appeared on August 20, 1983.

So that in my submission, Mr. Commissioner, if Phase II is to have any purpose, it must be able to go this far. If it can't go this far, then I submit that the public has really been misled when they were led to believe by the Order in Council and all the hoopla that attended its announcement that there was going to be an inquiry into the functioning of the justice system. If that is the case, I submit, with respect, that you should refer it back to the Attorney General for clarification. That would be the faster and more expedient course.



In the alternative, if you rule that I cannot do what I have submitted in my alternative submission, then I ask that you state another case. Fortunately, as it may be, it would be equally fortunate to my client to have participated in Phase I with the expectation that Phase II was going to give some object in her favour and then not to have to go ahead at all for any meaningful purpose.

THE COMMISSIONER: Yes. All right.
Thank you.

MR. HUNT: I am told there will be heckling today, so I will use this podium!

THE COMMISSIONER: Yes.

MR. HUNT: Sir, as I understand your concern, it is that if you are precluded, either by the Terms of Reference or by the judgment of the Court of Appeal, or a combination of both, from commenting in any report on the conduct of the parties involved in the investigation and prosecution, then it is your concern that Phase II may not really be a worthwhile exercise at all, but in my submission your mandate comes from the Order in Council. The judgment of the Court of Appeal has very little to do with determining what you can do on the second phase. The Order in Council empowers you to enquire into the



1
2 investigation and prosecution and, in my submission,
3 ~~that~~ was intended to, and clearly does, empower you
4 ~~to~~, not only receive the evidence as to what happened
5 ~~in~~ connection with the laying of charges and prosecu-
6 ~~tion~~ but also to comment on the conduct of the people
7 ~~involved~~.

8
9 The only restriction imposed on you
10 the one we are all familiar with in the Terms of
11 Reference that prevents you from making any conclusions
12 with respect to criminal or civil responsibility. I
13 stress the word "responsibility". All that the Court
14 of Appeal has said in connection with the argument
15 in Phase I that really touches on this question is in
16 the passage that you have pointed out at pages 14 and
17 that it is possible, depending on the evidence,
18 that conclusions, findings of fact you make without
19 ~~any~~ will either amount to conclusions of law with
20 respect to civil responsibility or may be taken by the
21 public and others to be conclusions of law with
22 respect to civil responsibility. That really does
23 not go much further, in my submission, in the Terms
24 of Reference than the proviso in the Terms of
25 Reference.

26
27 We all know there is going to be a
28 grey area presented to you on the evidence, both in



Phase I and in Phase II, and you are going to have to draw the lines yourself. That is where the task becomes difficult. Some have called it nearly impossible or an impossible task. It is, quite clearly, a difficult task to draw those lines.

To speculate at this time as to what can or cannot say in your report is difficult as well because we don't know what the evidence will be.

Your mandate is to hear all the evidence, in my submission, and that is true in Phase I and Phase II.

THE COMMISSIONER: That is what people have been telling me. I am not at all sure that is so. My mandate is limited by what I can report. Surely, if it is what I am to investigate, I can't allow the Commission to go all over the lot with all sorts of allegations about things that I can't report on. That, surely, it seems to me, is fundamental. We got around that in Phase I, and I am repeating myself now, by the fact that I have to investigate the cause of death, and I interpreted that investigation differently than the way the Court of Appeal eventually interpreted it, but at least there is that excuse. In Phase II, where is the excuse for receiving anything upon which I cannot report?



D4 1
2 MR. HUNT: Aren't there really two
3 questions here? We have blended the two. One is
4 what are you empowered to do so far as Phase II is
5 concerned? I say that you are obliged to hear all
6 the evidence.

7 THE COMMISSIONER: What evidence?
8 I'm sorry.

9 MR. HUNT: I will address that.
10 Saying that, I don't say there aren't going to be
11 ~~objections~~ that are going to be objected to by parties
12 that you are going to have to rule on.

13 THE COMMISSIONER: Surely, the funda-
14 mental question will be: Why did you do that? And
15 there will be an objection and I will have to say
16 that we can't decide why he did that or whether it
17 was a right decision or a wrong decision.

18 MR. HUNT: You see, this is where
19 ~~we get~~ into the difficulty of arguing in the abstract.

20 If a question is posed that the sole
21 purpose of which is to demonstrate civil responsibility
22 on the part of somebody or that is the purpose --

23 THE COMMISSIONER: I can't think of
24 any questions that won't be directed in cross-examination
25 that won't be directed to that very purpose. That is,
you put a policeman in the box; the first thing that



D5 1
2 Mr. Sopinka will do, if he is interested in his client
3 at all, he will say, why did you charge me - as he has
4 put it - after only two days of investigation? Why
5 didn't you do this? Why didn't you investigate more?
6 Why didn't you find out about the Estrella thing?
7 Why didn't you do this, that or the other thing? Any
8 of these questions are admissible.

9 Are you saying they aren't?

10 MR. HUNT: I'm saying to you now that,
11 in the abstract, I find it difficult to respond
12 effectively to that. What I am saying to you is that
13 there are going to be questions that have to be put
14 before to find out what happened. That is what you
15 are charged to do.

16 THE COMMISSIONER: That is right.

17 There is no question that, even as it stands, even in
18 the most restrictive interpretation, the policeman
19 can come in and tell what he did, whom he investigated,
20 what stories he got and what decisions he made. The
21 Crown Counsel can come in and say what they did. It
22 is the cross-examination that I am going to have the
23 most terrible trouble with. If I am going to have that
24 much trouble, if I am not going to be able -- if I am
25 not going to have the faintest idea of what I am going
to do, why should we go ahead with this thing? That



D6

is the problem.

The first question is, I don't know what Mr. Percival, when the time comes - but I put it to you as well, what are you going to do when the suggestion is made that the Crown Counsel - why did you do this? Why didn't you do this? Why didn't you ~~do this~~...? Are you going to permit those questions?

MR. HUNT: I will have to respond to them as they are raised at the time.

THE COMMISSIONER: I would like you ~~to answer~~ and right now, please.

MR. SOPINKA: I would like to have ~~the answer~~.

MR. HUNT: I will go this far: Questions as to why did you do something at a particular point in time may well be primarily relevant to determining what happened, what was the explanation for what happened. The question: Why didn't you do something else? Why didn't you do this? Why didn't you do that? It may be that I will have no objection to them at the time. It may be that my objection -- wait a second. That question is part of the line of questions that is solely being put to the question in order to affix that witness with civil responsibility for some wrongdoing. If that is the case, then



D7 1
2 there will be an objection but, surely, that is
3 something that is part of your function in Phase II,
4 to make those determinations when the questions arise
5 and not say at the outset --

6 THE COMMISSIONER: It is beyond my
7 ability, that is all. I don't know how I will ever do
8 it, unless I make sort of a blanket determination that
9 everything that reflects upon the conduct of the
10 witness is not allowed, because, otherwise, I am going
11 to be totally unfair to these -- if it is so that I
12 can't report and I allow these witnesses to be cross-
13 examined, all of these things reflected upon, then
14 I can't, if I want to, exculpate them from this. I am
15 not saying I want to at all. It may be quite the
16 other way. If I want to, if they have no chance of
17 coming out of it with anything but mud, I just don't
18 want to go on; that is all. At least, if they have
19 done a proper job, I want to be able to say so and I
20 also want to be able to say if they have done a
21 reasonable job or a half-decent job or a bad job or a
22 hopeless job. Any of those things I want to be able
23 to say because, otherwise, it would be unfair to the
24 people who were -- and, you see, I don't even have to
25 name names in the state of law.

The civil responsibility, the Chief of



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2 Police has the responsibility, am I not right, for all
3 of this officers; so it doesn't matter if I just
4 mention the police, the very fact that the police
5 are members of the Metropolitan Toronto Police, won't
6 that make him responsible? That is not your
7 What about the conduct of the Crown Attorneys?
8 Isn't that your responsibility? Isn't that the
9 responsibility of the Attorney General?

10 MR. HUNT: Yes.

11 THE COMMISSIONER: So, if I don't
12 mention the names of the Crown Attorneys, does it
13 make any difference? The Attorney General is
14 responsible.

15 MR. HUNT: Perhaps I am not under-
16 standing completely your thought here, but this issue
17 of identifying people in Phase II is a non-issue as
18 far as I am concerned.

19 THE COMMISSIONER: I agree with that,
20 but that was one of Mr. Sopinka's suggestions. I
21 thought, instead of attacking him with it - I am a
22 slow thinker - I am getting through to it now.

23 MR. HUNT: He can get back up here.

24 Everybody knows that Mr. McGee, Mr.
25 Wiley, prosecuted the case. Sergeant Press and
Sergeant Warr were investigating. No one, at least I



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2 am certainly not suggesting that there is any need to
3 restrict the evidence because their identities are
4 known or in order to keep them secret. The issue in
5 Phase I about identity is not a parallel issue in
6 Phase II.

7 THE COMMISSIONER: No. All right.

8 MR. HUNT: If there is a parallel
9 issue --

10 THE COMMISSIONER: The parallel issue
11 is the civil responsibility.

12 MR. HUNT: And the conduct and how
13 far you can go in commenting on the conduct.

14 THE COMMISSIONER: All right.

15 MR. HUNT: You have already said in
16 Phase I that you don't intend to go into the --

17 THE COMMISSIONER: You see, in Phase I--
18 I understand what you are saying and I am coming
19 around to it. In Phase I we can say whether there was
20 a murder, as long as we don't identify the murderer.
21 In Phase II we can identify people as much as we like,
22 as long as we don't say what they did.

23 MR. HUNT: No. I am saying to you
24 that the parallel between Phase I and Phase II comes
25 in at a much more specific place. It is not that you
can't say what they did. Certainly, you can say what



D10 1
2 they did. It is when you come to comment on -- there
3 is a difference between hearing the evidence and
4 saying this is what Mr. McGee did; this is what Mr.
5 Wiley did and then saying this is what I think about
6 what Mr. McGee did; this is what I think about what
7 Wiley did.

8 THE COMMISSIONER: You can say that
9 the police -- this is fanciful. They had a lottery
10 in the police station and they decided that we will
11 charge X for this sort of thing. I can say that, but
12 I can't say I think that is an improper police pro-

13 MR. HUNT: I haven't said that. I
14 say that you can listen to the evidence, you can say
15 this is what Mr. McGee did, this is what Mr. Wiley
16 did. I say that you can go so far as to say this is
17 what I think about what McGee did and this is what I
18 think about what Wiley did. Now, the question comes
19 at what it is you can say about your thoughts. All
20 that the Order in Council has said is that you cannot
21 express conclusions with respect to civil responsi-
22 bility. The Court of Appeal has said, well, you have
23 got to, when you interpret that, bear in mind that
24 certain findings of fact, by themselves, that you make
25 may say something about responsibility, so that
is a fine line that you are going to have to --



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THE COMMISSIONER: Who is going to
tell me when I am sitting alone trying to write this
report?

MR. HUNT: Mr. Lamek will probably
help you.

THE COMMISSIONER: I think he is going
to take a long holiday. I don't imagine, I will ask
him if he wants this task, of determining this fine
line at the end of the road as to what I can do.
He is going to have all of this and the public might
come to the conclusion perhaps the Commissioner
is going to tell us what this is all about and what
should have been done, and I can't do it.

MR. HUNT: They may not be entitled to
that, just like they may not be entitled to have you
tell them who killed the babies, if that is what you
conclude that the babies were killed. The public is
entitled to a full enquiry, to the evidence being
analysed and reported on by you. There are lines
drawn, there are clearly lines drawn in the Order
in Council that the Court of Appeal has confirmed.

THE COMMISSIONER: All right.

MR. HUNT: One of the lines is it may
be that they are not entitled to have you tell them
what should have been done by people. They are

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2 entitled to hear that you have received the evidence,
3 to have you report on it, and have your comments on
4 the conduct short of conclusions that attach civil
5 responsibility.

6 THE COMMISSIONER: Can you tell me how I
7 can do that? Tell me what I can say that would not
8 attach civil responsibility? If I say they should
9 have done something that they didn't do, is that
10 not a finding of fact which without some more will
11 only be - I have to be careful of this, but I know
12 Mr. Sopinka has defended his action on negligence
13 as well as malicious prosecution. If that is a
14 cause of action is that not negligence, they should
15 have done something? Surely they owe a duty to
16 people who are charged with crimes to investigate
17 them thoroughly. If I decide, if I say this was not
18 a sufficient investigation isn't that a finding of
19 fact which without more may create civil responsibility.

20 MR. HUNT: It may be. It may be.

21 THE COMMISSIONER: What more can I say.

22 MR. HUNT: We are talking in the
23 abstract. We are talking about really a conclusion
24 based on a number of findings of fact that you make.
25 I don't know what you might say about individual
acts of Crown Attorneys in commenting on what they



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2 did at a particular time. It may not raise any
3 concern about amounting to a statement that goes to
4 negligence or duty owed, to a breach of duty which
5 you say you are not going to get into. I don't know,
6 I can't tell you.

7 THE COMMISSIONER: I have said I was not
8 going to get into it, and the Court of Appeal said that
9 is exactly what you should get into in Phase I as long
10 as I don't mention who. They say that is I can
11 determine whether it was accidental, the act, or whether
12 the act occurred whether it was accidental, or
13 whether it was deliberate, that is what I am told that
14 I must now do. So anything I said before I take back,
15 the restrictions that I am going to put on myself,
16 those are withdrawn because I find the restrictions
17 are already imposed, that are now imposed are sufficient.

18 MR. HUNT: My portion of your comments
19 earlier that I was referring to was your comments
20 that you did not intend to get into what duty was
21 owed by anybody, what breach of any duty and that
22 sounds to me like negligence that you are talking about.

23 THE COMMISSIONER: That was certainly
24 what my original position was. That was on Phase I
25 anyway, that was my position in the Phase I. Now it
has proved to be invalid.



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2 MR. HUNT: I say now then if you are
3 rethinking that it may well be that you can get into --

4 THE COMMISSIONER: Try it again and
5 see what happens.

6 MR. HUNT: Well I am saying it may well
7 be that to get into duty owed and breach of duty in
8 such a way that your findings on those amount to, as
9 the Court of Appeal has determined the conclusion
10 going to civil responsibility, then you have to draw
11 the line somewhere short of that. That does not mean
12 that there is not a useful public exercise to be
13 served in having the evidence of what went on with
14 respect to the investigation and prosecution heard
15 by you in a public forum. Having you analyse it,
16 report on it and comment on it to the extent that
17 you can without being in breach of the proviso in the
18 Order in Council.

19 I suppose I have already said this, but
20 in my submission really you are - if you undertake
21 Phase II you are obliged to hear all the evidence,
22 subject to what rulings you may make during the
23 course of it and particular questions, or lines of
24 questions that may become apparent as we start Phase II,
25 to you, that they are going to direct you to an area
that as the area develops you determine is one that



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2 can bring you close to making findings which are-
3 themselves amount to a statement of civil
4 responsibility.

5 That is a question that I submit can
6 be left to be determined when it arises. If at this
7 point you are satisfied you are empowered by the
8 Terms of Reference to hear the evidence and to make
9 comments on it subject to the overriding proviso,
10 which was put in there for the protection at the
11 time of civil litigants, past , present and future.
12 Mr. Sopinka says it is a garden variety type of
13 public enquiry. It may well be, but it may be that
14 at the outset there were suits pending against the
15 Hospital, there were suits pending against the police,
16 there was a suit pending against the Attorney General
17 himself

18 For that reason the restriction was put
19 in there not to just govern Phase I, but to govern
20 Phase II. It is a unique situation not just with
21 respect to what happened in fact but also the
22 situation that prevailed at the time. So in my
23 submission -

24 THE COMMISSIONER: We had no such
25 trouble, I hate to refer to my lurid past, but we
had no such trouble in Mississauga. No one suggested



E6 1
2 the fact that the Order in Council wasn't
3 ~~going to make~~ comments, I didn't have to make comments
4 in that. My main concern was what happened and how
5 do we prevent it from happening again. I made all
6 sorts of comments in the course of that report about
7 things that people did and what I thought with
8 ~~respect to~~ what they did. I am concerned that because
9 of this restriction I will not be able to make the
10 same report here. If I am not able to make that
11 same report then why put the police and your clients
12 through, if I can put it, the agony of the cross-
examination^s and I can't do anything about it.

13 Really all I want to do is have it
14 resolved before I start in. If it develops that I
15 think I can't do anything, the whole exercise is
16 pretty futile. I may make a certain recommendation.
17 If on the other hand I think I can do something I
can try it out, but can't we get this thing resolved.

18 MR. HUNT: I hope we can. You asked
19 me why put my clients and the police through the
20 rigors of cross-examination.

21 THE COMMISSIONER: Yes.

22 MR. HUNT: Why? Because it is important
23 that the public know what went on in the investigation
24 and prosecution, that is one, that is the important
25



E7

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2 public service performed by an enquiry into that
3 aspect of this whole matter. Certainly my clients
4 are well aware that they are going to subjected to
5 rigorous cross-examination and they are prepared to
6 accept that because they understand that there is
7 an important public issue here as to what went on
8 in the investigation and prosecution. In my
9 submission that even stopping short of the comments
10 you may have made in the other commission or at least
11 you had been able to make. Why, if you can make
12 comments, even if you may have to draw the line
13 somewhere differently this time it is still important
14 that it be done.

13 THE COMMISSIONER: All right. Thank You.

14 MR. SOPINKA: Mr. Commissioner, I
15 wonder, you raised a point that seemed to be at
16 variance with that of the Court of Appeal placing a
17 limitation of what you can do. Mr. Hunt was saying
18 you don't have to determine duty and things of that
19 nature, and you said, well that was all wrong. I have
20 to do that. In my submission what the Court of
21 Appeal said you can do exactly what you said you could
22 do, determine whether the deaths were accidental or
23 otherwise but you can't name a names. It didn't say
24 you had to determine the legal consequences, and that
25



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2 is clear on page 18.

E8 3 THE COMMISSIONER: That is quite right.
4 I don't intend to determine legal consequences. I
5 certainly can say under the Court of Appeal's ruling
6 that I find that there are - let us say, that there
7 were deliberate overdoses of digoxin. I can find that
8 there was negligent overdoses of digoxin. The Court
9 of Appeal says that having made that finding those
10 facts without more amount to --

11 MR. SOPINKA: If you name names.

12 THE COMMISSIONER: No, even if I don't
13 they amounted to civil or criminal responsibility but
14 on the part of unnamed person, that's all.

15 MR. SOPINKA: I don't think they said
16 that.

17 THE COMMISSIONER: Well --

18 MR. SOPINKA: The thing that would have
19 resulted in a fixing of responsibility in the Court
20 of Appeal Judgment would have been naming names.

21 THE COMMISSIONER: Yes. All right.

22 MR. SOPINKA: After you determine
23 whether it is accidental or otherwise. Here as you
24 have said and as Mr. Hunt has said naming names is
25 not a problem, so you can do exactly what you did in
Phase I, you can say whether it was accidental or



otherwise or to use different words, whether the charges ought or ought not to have been laid, etc.

THE COMMISSIONER: All right. Thank you, Mr. Percival. You have an unlikely combination against you, at least I assume it is against you but let us hear what you have to say anyway.

MR. PERCIVAL: Mr. Commissioner, back on April 18th, in Volume 132, pages 478 to 491, I made rather extensive submissions to you with respect to our position as to where the Court of Appeal decision leaves this Commission in both Phase I and Phase II. I don't propose to repeat those submissions in any detail. Basically they represent our continuing position on this rather vexing problem.

We proposed at that time that you could do a number of things to rectify the situation, none of which obviously found favour with either you or your counsel and you proceeded ahead to finish the evidence, and most of the evidence in Phase I has now been completed.

Under Phase I you were empowered to the governing clause is:

"Without expressing any conclusion of law regarding civil or criminal responsibility.



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2 3. To enquire into and report and
3 make any recommendations with respect
4 to how and by what means the children
5 came to their death;"

E10 And the important, the key issue in the first Phase
6 of the inquiry you have indicated during the course of a number
7 of months of hearing and in response to some of the
8 submissions made to you by both Mr. Sopinka and Mr.
9 Justice. The key issue is "what was the cause of death?
10 How and by what means?", and of course that was the
11 only overriding consideration in Phase I.

12 The other matter as to whether you
13 could name names or not was a matter of collateral
14 consideration but it was not the key issue in Phase I,
15 with respect.

16 The Court of Appeal at page 18 and you
17 have read it I am sure, indicated to you that you
18 were obliged to hear all of the evidence relating to
19 that, and that you could not identify an individual
20 and that was the decision, that is the gravamen of
21 the decision relating to the Phase I consideration.

22 The practical effects of that decision
23 in the Court of Appeal surely argue that you cannot
24 implicate any person or institution as a result of
25 their interpretation of the Orders in Council.



1
2 Similarly, you cannot exonerate any
3 ~~person~~ or institution. Again based upon the plain
4 ~~meaning~~ of the Court of Appeal decision that relates
5 to the whole Order in Council.

6 What you have been required to do, you
7 have to look at it, it seems to me, because the
8 ~~existing~~ line without expressing any conclusion of law
9 ~~regarding~~ civil or criminal responsibility holds true
10 ~~with respect~~ to both paragraph 3 and paragraph 4. I
11 ~~think~~ in order for you to determine what your power
12 and authority is in Phase II you must look at the
13 terms of Order in Council and regard them. The
14 change in terminology is rather interesting and I
15 say to you it is important.

16 If you look at the authority under
17 ~~paragraph~~ 3 again, the preamble without expressing any
18 conclusion of law regarding civil or criminal
19 responsibility, you were to enquire into and report
20 ~~on and~~ make any recommendations with respect to
21 how and by what means.

22 Now you note how it changes the
23 terminology when you get into paragraph 4:

24 "To enquire into, determine and
25 report on the circumstances surrounding
the investigation, institution, and

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prosecution of charges arising out of
the deaths of the above mentioned four
infants;"

You will note I am satisfied, Mr.
Commissioner, and I am sure you all ready have that
word "determine" has been inserted in paragraph 4
where it was not in paragraph 3. The words "and
make any recommendations" have not been carried
forward into paragraph 4 and in fact have been
deleted if one uses the same terminology.



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2 I say to you you must consider for the
3 purposes of your deliberations as to where you're
4 going in Phase II as to first of all what significant
5 if any is the deletion of the words, "make recommenda
6 tions", and the insertion of the word, "determine",
7 in paragraph 4.

8 The word, "determine", according to
9 the Oxford dictionary, says the word "determine" means
10 to find out or calculate precisely, to settle or
11 decide and, thirdly, to come to a conclusion or give
12 a conclusion.

13 Obviously I say in relation to Phase II
14 and the interpretation of Paragraph 4 you are required
15 to make inquiries and hear evidence and find out what
16 investigation was performed by the police and what
17 was done by the Crown and the Prosecution of the
18 charges.

19 However, I point out to you, Mr.
20 Commissioner, you are not asked to make any recommendations
21 as to how the investigation should have been done or
22 how the prosecution should have been conducted. You
23 have no authority to do so, at least in relation to
24 the plain wording of Paragraph 4.

25 THE COMMISSIONER: Well, recommendations
surely are for the future, are they not?



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2 MR. PERCIVAL: Well, recommendations
3 relating to how and by what means, if you are going
4 to talk about recommendations, that's what Paragraph
5 says, are you going to be talking in terms of
6 recommendations as to how and by what means?

7 THE COMMISSIONER: No, but make any
8 recommendations with respect to how and by what
9 means children who died, perhaps what it means there
10 that I will make recommendations so that the same thing
11 will not happen again, although, I would have thought
12 that was already been done in the Dubin Report.

13 MR. PERCIVAL: I would have thought so,
14 I would have thought so.

15 THE COMMISSIONER: Surely if we didn't
16 have this limitation without expressing any conclusion
17 of law regarding civil or criminal responsibility
18 we would have had no trouble with this paragraph.

19 MR. PERCIVAL: That's right.

20 THE COMMISSIONER: That inquire into,
21 determine the report on the circumstances would be
22 enough not only to report on them but to say what
23 I think of them.

24 MR. PERCIVAL: Well, with respect, I
25 don't think you are authorized to do that, with
respect.



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2 THE COMMISSIONER: Well, perhaps not
3 now, perhaps not now. All I'm saying, if we just
4 ~~the~~ Paragraph 4 without the limitation I wouldn't have
5 any difficulty with it - you might but I wouldn't
6 have any difficulty with it. I would think I was
7 supposed to look into what happened and say what I
8 think of it.

9 MR. PERCIVAL: What I am saying to you,
10 ~~the~~ Commissioner, the limitation imposed upon you
11 ~~by the~~ terms of the Order in Council are two fold:
12 ~~that~~ you are only authorized to make inquiries as to
13 ~~what~~ was done and not what should have been done and
14 you are not authorized to make any recommendations
15 in relation to Phase II. You must inquire and hear
16 evidence that will support conclusions that cannot
17 be expressive of either civil or criminal responsibility.

18 Now, you know, this question, and I
19 ~~said~~ this before and I'm going to say this again, this
20 ~~whole~~ consideration of civil responsibility is of no
21 little consequence to the clients that I represent.
22 They are facing a law suit at the present time for
23 damages for \$854,000 plus prejudgment interest
24 in an action commenced by Susan Nelles for both
25 negligence and malicious prosecution and, for the
record, and I propose to now file with you both a copy of



1
2 the Statement of Claim and a copy of Statement of
3 Defense because you must look at that before you
4 determine where we are going on the issue of civil
5 liability.

6 May I ask that these be marked as
7 exhibits. It is a Statement of Claim and a Statement
8 of Defense filed on behalf of the clients that I
9 represent.

10 THE COMMISSIONER: Yes, all right.

11 MR. PERCIVAL: Copies are being
12 distributed to other counsel by Mr. Young at the
13 present time.

14 THE COMMISSIONER: What number are
15 at, please?

16 MR. PERCIVAL: Mr. Commissioner, I
17 ask you to note that this statement --

18 THE COMMISSIONER: Can we put them in
19 as one exhibit?

20 MR. PERCIVAL: That will be fine, that
21 will be fine.

22 THE REGISTRAR: 412.

23 THE COMMISSIONER: 412 is the number.
24
25



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2 --- EXHIBIT NO. 412: A Statement of Claim and a
3 Statement of Defense submitted by
4 Mr. Percival's clients.

5 MR. PERCIVAL: Now, I ask you to note,
6 Commissioner that this Statement of Claim is as
7 a result of a Supreme Court action and the
8 Writ was issued on November 5th, 1982, the Statement
9 of Claim was delivered on January 26th, 1983 and both
10 of which were in existence before the Order in
11 Case 1 was prepared which gives you your authority

12 Now, the Statement of Claim is very
13 that that they claim both negligence and malicious
14 intent on the part of the officers in relation to
15 what they did involving their investigation and the
16 laying of charges against Susan Nelles. The
17 allegations of negligence are there in some considerable
18 detail and that is the law suit that my clients
19 are facing at the present time. Pleadings have been
20 completed, no Examinations for Discovery have been
21 commenced, a successful application has been made
22 by Mr. Hunt's clients to strike out the plaintiff's
23 cause of action against the Crown Attorneys as
24 disclosing no known cause of action.

25 Mr. Sopinka, I think has told you on
an earlier occasion that that decision is presently
under appeal.



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2 So, that is where that action is at
3 the present time.

4 I submit to you that given the
5 delineation of the issues Mr. Sopinka has the right
6 in that action to ask all the questions of the police
7 officers involved in the investigation with a view
8 to attempting to show either that (a) they acted
9 negligently in the course of their investigation or
10 (b) that they acted deliberately with malice.

11 However, I suggest to you that in this
12 Commission and in Phase II that such a right does
13 not exist for Mr. Sopinka or any other counsel to
14 question the police or any other witness in Phase II
15 as to why they didn't do this or that and why they
16 did act in a certain manner because such evidence
17 if permitted could only be relevant to the issue
18 whether the police were guilty of malfeasance, non-
19 feasance or influenced by malice or an attempt to
20 injure Susan Nelles.

21 If the evidence has to go to that then
22 it is the wrong forum and you are not authorized,
23 with respect, given the limitation imposed upon you
24 by the Orders in Council.

25 The questions, the cross-examination
questions as to why you did this and why you did that



1
2 surely cannot be relevant to any other issue in
3 Phase II. It can't be. It is not the overriding
4 about how and by what means the cause of death, there
5 is no other issue in Phase II that could be directed
6

7 It is my submissions you are only
8 authorized to make inquiries into what the police
9 did in the course of their investigation and report
10 on that investigation.

11 I submit you are not authorized to
12 hear evidence of a nature that may tend to show that
13 either the police or the Crown Attorneys did something
14 wrong or failed to do something in the course of
15 their investigation or prosecution.

16 Now, in Phase II you have, just as
17 you did in Phase I, competing considerations, with
18 respect. The police force want to tell the public
19 what they did in the course of their investigation.
20 The public is entitled to know what was done with
21 their tax paid dollars to try to put an end to this
22 epidemic of baby deaths and the end did occur with
23 the arrest of Susan Nelles. But on the other hand
24 the police officers -- In effect, the citizens
25 of the Municipality of Metropolitan Toronto are in
effect the defendants in this civil law suit commenced



1
2 by Susan Nelles.

3 THE COMMISSIONER: Yes. I would have
4 ~~be possible~~ with those competing obligations if it
5 weren't for the decision of the Court of Appeal.

6 MR. SOPINKA: I under stand that,
7 Mr. Commissioner, but, you know, you have indicated
8 that you are going to live with it and I guess if
9 it holds true to Phase I it holds true to Phase II
10 and that's the unfortunate dilemma with which you
11 are being faced with at the present time and it is
12 a continuing, vexing problem.

13 Now, the forum surely for an inquiry
14 into the alleged improper actions of the police
15 ~~officers~~ and suggested malice on their part is surely
16 the forum that Mr. Sopinka chose in the first
17 ~~instance~~ before this Commission was created by the
18 Orders in Council. That limitation involving
19 ~~potential~~ civil liability I submit to you is significant.

20 If you made an adverse finding or
21 ~~conclusion~~ or decided a matter of fact with respect
22 to a police officer, a coroner or a Crown Attorney,
23 ~~that~~ adverse finding would be tantamount I submit to
24 a finding that would reflect on the potential civil
25 liability of that individual.



1
2
3 Now, it is true, without question,
4 ~~there is~~ provision in the Public Inquiries Act that
5 that sort of thing, that evidence that they give
6 cannot be utilized, your findings could not be
7 utilized in a subsequent civil action, but just as it
8 is true, just as it is true with respect to a criminal
9 ~~charge~~ against Susan Nelles or Phyllis Trayner, the
10 question was put by Mr. Sopinka too often in this
11 ~~court~~ in the Divisional Court, in the Court of Appeal
12 about how could they get a fair trial. We are facing
13 a ~~civil jury~~ trial in the Municipality of Metropolitan
14 Toronto. If you are going to make findings, hear
15 such evidence, permit such cross-examination, how is
16 that to be a fair trial in due course? Surely the
17 civil rights of the nurses are no different, are no
18 more than that of the police officers.

19 That of course is the issue that you
20 have to address in relation to making your decision
21 in this matter. I want you to refer if you would to
22 the ~~fact~~ that Mr. Sopinka keeps saying that, oh, no,
23 that only deals with Phase I. Look at page 17 in the
24 Court of Appeal decision with me, if I may point this
25 out to you, and at the middle of the first paragraph:

"In our opinion the specific limitation



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2
3 imposed on the Commission by the Order
4 in Council in the circumstances was
5 imposed out of concern for those
6 persons who might become involved in
7 other proceedings or be called upon
8 to stand their trial."

9 Now, whether that is criminal or whether
10 that is civil, clearly that has to do with both of
11 them. It is a limitation of civil or criminal
12 responsibility. So, whether or not it is a potential
13 charge of murder or a potential charge of gross
14 negligence or relating to the deaths of the babies,
15 surely it goes as well to this potential civil
16 responsibility of the Police Chief acting as the
17 titular head of all the members of the police force
18 and the police officers in question.

19 If the nurses would be deprived of
20 a fair trial if you do certain things how is it any
21 different for the police in relation to this action
22 with which we are faced? It is no different I submit.
23 What holds true for one surely should hold true for
24 the other.

25 THE COMMISSIONER: No, I think we can
go a little farther because there is always the
possibility I might exonerate the police completely.



1
2 MR. SOPINKA: But you can't. You can't
3 with respect.

4 THE COMMISSIONER: No.

5 MR. PERCIVAL: And that's what I said
6 back in April 18th.

7 THE COMMISSIONER: How does Susan
8 Belles get a fair trial?

9 MR. PERCIVAL: That's right. I mean,
10 that's the unfortunate dilemma you are being faced
11 with by the Court of Appeal decision. You can't
12 implicate and you can't exonerate, with respect.

13 Now, I am going to answer the question
14 that you put to Mr. Hunt and said that you were going
15 to put to me because I fully intended to put it, to
16 tell you, and this is where Mr. Hunt and I part
17 company. I am not going to wait until it happens.
18 May I tell you that if you decide to proceed with a
19 full scale Phase II and you decide that you are
20 authorized to proceed fully with respect to an inquiry
21 into Phase II and permit the cross-examination that I say
22 you are not authorized to do, then on the first
23 question that is put to any client that I represent
24 that tends to show why they did this and why didn't
25 they do that, I will object, I will ask you to state
a case and we will go merrily on to the Divisional



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2 Court and the Court of Appeal. This time I will be
3 arguing the reverse of what I argued before. Mr.
4 Sopinka will have the privilege of doing the reverse
5 as well.

6
7 MR. SOPINKA: And probably with the
8 same results.

9
10 THE COMMISSIONER: Well, I'm not to
11 sure what that means!

12
13 MR. PERCIVAL: So, Mr. Commissioner,
14 I would submit on behalf of my clients that you should
15 hear the evidence in Phase II. I say that you are
16 authorized to hear such evidence but only on a
17 limited basis, to which I have alluded. In other
18 words, hear what the Police did, hear what the
19 Crown Attorneys did, report on that, but when we get
20 to the point of whether they should not or should have
21 then we part company, with respect.

22 Those are my submissions.

23
24 THE COMMISSIONER: Yes. All right,
25 thank you. Mr. Scott?

26
27 MR. SCOTT: Mr. Commissioner, there is
28 not much more to be said at this stage that would be
29 of use to you but as Mr. Sopinka points out that has
30 never been a problem - for him.

31
32 MR. SOPINKA: For you.



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2 MR. SCOTT: Let me begin by saying that
3 unlike the others I don't intend to tell you that
4 if you don't do what I want I will ask for a stated
5 case and go to the Court of Appeal. The posture of
6 the Hospital throughout has been to co-operate with
7 this inquiry, to support any findings you make as to
8 your powers under the Act and to assist you in a
9 general way in bringing the task to a reasonable
10 expeditious conclusion in as fair a way as can be
11 done.

12 But when you approach this problem I
13 think there are a couple of observations that might
14 usefully be made. The first has to do with Mr.
15 Sopinka's reading of the Decision of the Court of
16 Appeal.

17 In the first place the Court of Appeal
18 decision is, and I think you are right about this,
19 is explicit that you are obliged if you can on the
20 evidence to find murder.

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2 It said you couldn't name names but if
3 you should conclude on the evidence that there was a
4 murder at the Hospital, you must say so, and that is
5 clear at page 15, where the Court was responding
6 to the argument we were making that you could name
7 if you left out of your findings elements that
8 to do with the state of mind or intent of the
9 actor. We were relying, as you recall, on the
10 opinion of Mr. Justice Reid, which said that that
11 premise would permit both the interests of Mr.
12 Inka's client and the interests of the Inquiry to
13 co-exist. There, the Court of Appeal said, in the
14 fact of that:

15 "He (meaning you) has no discretion
16 that would permit him to decline to
17 make a finding of intent or state of
18 mind relative to the cause of death
19 in order to make a finding identifying
20 the person responsible because, in
21 his view of the interests, it would
22 be better to do so."

23 So, really, the Court of Appeal has
24 not only said that you may make in Phase I all the
25 findings with respect to the elements of murder except
the name, they go further and say you have no discretion



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G2 2 to refuse to do that if, of course, the evidence
3 warrants those findings.

4 That is the first point. That point,
5 of course, I will be telling you, is as relevant to
6 Phase II as it is to Phase I.

7 The second point to be observed is
8 that there is no constitutional impediment or issue
9 in this proceeding at the present time, notwithstanding
10 Mr. Sopinka's efforts. The Court of Appeal, in
11 the paragraph to which he has referred and which I
12 will not read again, made it perfectly plain that if
13 the language "no civil or criminal findings" had not
14 been included, there might have been a constitutional
15 issue, but there wasn't that problem because the
16 language was there, and what they did explicitly
17 was interpret the impact of that language. Their
18 interpretation, as you have noted, sir, must apply
19 to Phase I as well as to Phase II because the Order in
20 Council doesn't make any distinction about the applica-
21 tion of that language as between the two phases, and
22 none can be drawn if the Order in Council doesn't
23 permit it.

24 Now, a couple of other observations.

25 I take it that it be obvious that if
you can't name names in Phase I, you can't name names



1
2 in Phase II. There is simply no basis for distinguish-
3 ing between the two phases.

4 THE COMMISSIONER: Well, I wonder.
5 You see, the thing is, really, the prohibition is
6 against determining civil responsibility. It does
7 say to me that one can name names if there is some way
8 you can avoid -- the problem is, is there any way,
9 after naming names, that I can avoid. In Phase II,
10 it seems to me, we either have to name names and
11 whether we do or not, it doesn't matter. The
12 obvious -- the liable defendant is there. But if
13 there were some way that we could name the names or
14 not name the names but at least set forth some kind
15 of useful information without -- by giving that
16 information without in the same breath giving an
17 opinion on civil responsibility, whether it is stated
18 or not --

19 MR. SCOTT: One hopes that that could
20 be done, but the problem is that the Court of Appeal
21 foreclosed Mr. Justice Reid's determination, which was
22 precisely that. The problem put to the Court was
23 that if you make all these factual findings, including
24 the naming of names, you are making a finding which
25 is tantamount to a criminal liability finding; so
what was proposed, which the Court of Appeal ultimately



1
2 adopted, is remove the ultimate finding; that is, the
3 name of the actor, from the mix and you go ahead and
4 do everything else.

5 As the Court of Appeal said, in the
6 passage I have just read, you must go ahead and do
7 everything else. You cannot avoid looking at intent
8 if the evidence warrants it.

9 So that was the justification for
10 the rationale that the Court of Appeal adopted.

11 Now, applying that to Phase II, it
12 would be useful to say, well, we will name names in
13 Phase II. We simply won't make one of the other --
14 we won't find one of the other elements - we won't
15 find negligence. But the Court of Appeal, in that
16 passage that I have read, says that you can't do that.

17 Now, it may be that they didn't
18 intend to say that. It may be properly instructed
19 once again by Mr. Sopinka that they would say some-
20 thing else, but the fact is that that is what they
21 have said. Therefore, in my respectful submission,
22 you will have to exercise your well-known ingenuity
23 to permit the naming of names in Phase II if it is
24 not to be permitted in Phase I.

25 Now, when you come to the naming of
names, the next question is, what are we talking about



1
2 in terms of names? I take it to be obvious, and
3 all counsel no doubt would agree on this, that when
4 we are talking about names, we are not only talking
5 about names of individuals, we are talking about
6 names of institutions that have them, like the
7 Metropolitan Toronto Police Department and the Crown
8 Attorney's Office. You can name the Hospital; we
9 don't care about that.

10 MR. SOPINKA: Obviously, that must
11 be included or my friend wouldn't be taking his
12 position.

13 MR. SCOTT: No, not at all. I have
14 said initially that we are quite prepared to support
15 you in whatever you want to do on this subject, but I
16 think it is significant to recognize that when you
17 get into Phase II, if unimpeded by the Court of
18 Appeal decision, there are going to be some interesting
19 propositions put to you. As the Attorney General and
20 the Police flay back and forth in the evidence, it may
21 be that they are going to say that other people -- that
22 they wouldn't have done what they did unless other
23 people, nurses, for example, had done thus and so. We
24 have already, in Phase I, heard suggestions that the
25 police were, in some sense, handicapped because the
nurses had a meeting within a day or two of the



G6

criminal events.

Now, if that comes up in Phase II, the question will be put to the witness: Well now, witness, wasn't that meeting you and your fellow nurses had designed to impede the police investigation? If that question were put, the damage is done when the question is asked and you can't make a finding in the Inquiry that determines that that inuendo is unwarranted because, to do so --

THE COMMISSIONER: Would that involve the nurses in any responsibility? Because, surely, the nurses don't have to -- they don't have to cooperate with the police if they don't want to.

MR. SCOTT: I understand that entirely, but you are going to have to deal with that. This is an imaginary scenario for the moment but let's assume that the police, that criticism is made of the police, as Mr. Sopinka has already made it, for laying the charges within two days and supposing the police were to say, well, the reason we did that was because the nurses were freezing us out, having meetings, and we had to do something. That is their explanation for the alleged misconduct. You have to find if that is justified or not and, in the course of that, you will have to make comments about the



G7

conduct of various people, not only the police and the Attorney General but also perhaps of the nurses, and that may expose them, too -- It may, I don't say it necessarily will.

THE COMMISSIONER: I don't think it would but I might be wrong. I suppose it is arguable.

MR. SCOTT: It may. I put it no higher than that; it may.

The other interesting feature about the task before you is that when we were in Phase I or when we were dealing with Phase I --

THE COMMISSIONER: As we were yesterday and we will be tomorrow, yes.

MR. SCOTT: -- there was an area of enquiry and finding about which nobody doubted your powers under the Order in Council - how and by what means the babies died. Therefore, what we were talking about when we applied the Order in Council to Phase I and applied the Court of Appeal decision to Phase I was the fringes. Everyone admitted that the heart of the Phase I work still had to be done to determine the medical causes or the non-medical causes of these babies' deaths.

Now, the issue for you is applying the



1
2 no-naming of names principle to Phase II: Is there
3 any enquiry heart left in Phase II that can be dealt
4 with in any significant way without the naming of
5 names?

6 Now, on the one hand it can be said,
7 and has been said, that it is useful to have the
8 witnesses in the witness box so that the public can
9 hear what they say, and I am very sympathetic to
10 that general proposition. On the other hand, it can
11 and has been said that the whole thing is an
12 extravagance at public expense. If you are impeded
13 from making any determination in a practical sense
14 in light of the Court of Appeal decision, one of
15 the difficulties, it seems to me, is how could you
16 make any comment? You might want to, but how could
17 you make any comment on the conduct of these actors -
18 the police, the police officers, the Attorney General,
19 the Crown Attorneys - without exposing them potentially
20 to civil or criminal liability?

21 If, for example, Mr. Sopinka at the
22 end asked you -- examined a police officer - why
23 didn't you conduct a longer investigation? Only
24 two days? He gives his reasons why he acted and what
25 he did and Mr. Sopinka comes along at the end of the
Inquiry and asks you to find that they moved too



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2 quickly. Well, that is a finding that goes directly
3 to civil liability.

4 Now, if you can't do any of those
5 things, and it is for you to say whether the Court of
6 Appeal precludes that, you can blame it on the Court
7 of Appeal and you can say whether the Court of Appeal
8 precludes that. It is hard to see any area in which
9 you can pursue your evidence that will produce a
10 useful result and, while there is much to be said for
11 hearing the evidence, almost without cross-examination
12 because very little would be permitted under these
13 ground rules - there is a lot to be said for hearing
14 it because the public has a certain right to know what
15 went on.

16 It seems to me what you have to weigh
17 is whether the public interest requires the extravagant
18 expense that this will necessitate in a circumstance
19 where the Court of Appeal has deprived you, or the
20 Order in Council has deprived you, of the right to make
21 an effective finding.

22 I don't think I can assist you any
23 further.

24 THE COMMISSIONER: There is one
25 question. You don't need to answer it at all. What
about the suggestion of going back to the source and



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2 asking for clarification before we make any final
3 determination?

4 MR. SCOTT: Which source? The Attorney
5 General or the Court of Appeal?

6 THE COMMISSIONER: No. The source I
7 am talking about is the Lieutenant Governor in Council,
8 who issued this Order in the first place.

9 MR. SCOTT: I would have thought,
10 with the greatest of respect, sir, the first stage
11 is for you to decide what you think your powers are.

12 THE COMMISSIONER: I did decide that
13 once, and you know what happened to me. I had some
14 firm ideas in that instance. I really have none in
15 this.

16 MR. SCOTT: With the greatest of
17 respect, I would be uncomfortable if anybody thought
18 that I was defending Mr. Hunt's client at this point,
19 let alone the Attorney General. Surely, it would be
20 unfair to the Attorney General to sort of go back
21 to him and say that I have this problem, will you
22 look at the Order in Council. It seems to me that
23 what is required for you is to decide the issue and
24 then, when it is decided, if the Attorney General --
25 he won't be unaware of your decision and, if he acts,
he acts. If someone wants to go to the Court of Appeal
then, they can go to the Court of Appeal again.



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2 THE COMMISSIONER: That is a horrifying
3 thought, because, what do we do in the meantime. I
H/DM/LN 4 really don't want to start until we get this settled.

5 MR. SCOTT: No.

6 THE COMMISSIONER: I don't want to go
7 through what we went through the last time.

8 MR. SCOTT: I think, if I may respectfully
9 say so, I think that is entirely sound, but if you
10 make your decision and if your decision is to
11 barrel ahead and carry on, well then you carry on
12 unless someone then - unless the Attorney General
13 intervenes or unless somebody asks for a stated case.

14 If your decision is that you can't
15 carry on in the circumstances, then those who think
16 you should can apply for a stated case. I have no
17 doubt that we can get it dealt with expeditiously

18 THE COMMISSIONER: Yes, but not until
19 the Fall. They were very cooperative the last time,
20 and I am sure they will be cooperative again, but
21 there is no possibility of this thing being decided
22 until the Fall. What do I do in the meantime, I
23 suppose I write Phase I. It keeps me occupied and
24 out of trouble.

25 MR. SCOTT: Yes.

THE COMMISSIONER: But we don't continue



1
2 with Phase II.

3 MR. SCOTT: I would have thought that
4 it would be heard, I suppose Counsel will have to
5 analyse whether we have to go through the Divisional
6 Court.

7 THE COMMISSIONER: What I am concerned
8 with is this. If, shouldn't the Attorney General
9 be asked what he intended, or what the Lieutenant
10 Governor in Council intended, and if they intended
11 something different from what it appears the Court
12 of Appeal has ruled as far as Phase II is concerned,
13 let him give some thought to correcting it because
14 that can be done in an afternoon.

15 MR. SCOTT: Yes.

16 THE COMMISSIONER: Whereas this
17 other procedure will take all of this time and I will
18 not - I promise you I will not do anything until it
19 is resolved.

20 MR. SCOTT: Well I have no objection
21 to asking the Attorney General. My only concern is
22 whether it should be - whether it is fair to ask him
23 or the Lieutenant Governor before you have enunciated
24 what the problem is.

25 THE COMMISSIONER: Certainly I am
going to enunciate what the problem is. You think



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2 I have to make a decision one way or the other.

H3 3 MR. SCOTT: Well there is no problem
4 until you decide what the Terms of Reference mean.

5 THE COMMISSIONER: There is a problem
6 and the problem is going to come in the first question
7 in cross-examination of the police officer.

8 MR. SCOTT: Yes.

9 THE COMMISSIONER: And I know what the
10 problem is and I want to face it now and get it
11 resolved.

12 MR. SOPINKA: Give him a transcript
13 of his argument and he will know what the problem
14 is.

15 MR. SCOTT: I don't object to your
16 asking him and that may be the appropriate course.
17 My only concern is that perhaps he might very well
18 say, well look, what is your ruling. If you make
19 a ruling I will then be guided by the policy considerations
20 as to do we amend your Order in Council
21 or not, but absent a ruling I have nothing to
22 reconsider. So it may just get bounced back. If you
23 want to try by asking him I see no harm in it, and I
24 am sure Mr. Hunt can carry the message. It would,
25 there is no doubt it would be the expeditious
resolution of the difficulty.



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THE COMMISSIONER: What I don't want

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to have happen, I don't want to come to that moment that

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Mr. Percival has promised, I don't want to make all

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these arrangements and sign the lease and all the rest

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of it and then find that all of a sudden the whole

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thing folds. That is what I want to avoid. I think

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we really should - there are times when we really

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have to --

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MR. SCOTT: You see, sir, with the

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greatest of respect without a ruling, if you make a

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request of the Attorney General, and I don't know

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whether you can do this, but he might just hold a

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press conference or make a statement in the Legislature

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telling the Legislature what was intended. Well, we

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all ready have one of those which has been used by

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both sides.

18

THE COMMISSIONER: It would have to

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be amended to make it clear. Notwithstanding what

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he may say, what he intends, but that doesn't stop

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Mr. Percival from applying for a stated case.

22

MR. SCOTT: No.

23

THE COMMISSIONER: And I have no doubt

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that he will proceed so he has got to make an

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amendment, and if he doesn't make an amendment it
is useless.



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2 MR. SCOTT: Well that is one course
3 that you can follow, it certainly has the virtue of
4 expedition. I can ask you to consider whether you
5 want to make that request in the light of, in advance
6 of telling them what you think you would be obliged
7 to rule.

8 THE COMMISSIONER: Supposing I didn't
9 say what I thought I was obliged to rule and say to
10 the Attorney General, is this what you had in mind.
11 Is it, will you please take the appropriate steps.

12 MR. SCOTT: And that way you would be
13 telling him in advance what your ruling would be.

14 THE COMMISSIONER: No, I would tell him
15 I could make the ruling but then before anybody had
16 a chance to ask me for a stated case he could, if
17 he wanted to, if he wanted to, if he doesn't want to
18 he doesn't have to, he could amend the Order in
19 Council.

20 MR. SCOTT: Yes. And there would be
21 a certain justice in making that request of him, I
22 understand that. I am obliged to you.

23 THE COMMISSIONER: Yes. All right.
24 Thank you. I think we will take a few minutes now
25 and then I will hear from anybody else who wants to
be heard from, including Mr. Lamek and there will be



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2 an opportunity for reply. I guess I should offer
3 that opportunity to Mr. Sopinka and Mr. Hunt.

H6 4 MR. SOPINKA: It will be quite short.

5 THE COMMISSIONER: Yes. Okay. All right.
6 We will take 20 minutes.

7 --- (Short recess)

8 --- (Upon resuming)

9 MR. SCOTT: Mr. Commissioner, there is
10 one point that I might have added to.

11 THE COMMISSIONER: Yes.

12 MR. SCOTT: And I am grateful to one
13 of my friends for pointing it out. If there is any
14 doubt that the phrase "without finding any criminal
15 or civil liability" applies to the Phase II issue
16 as well as Phase I, if there is any doubt about that
17 and I think Mr. Sopinka doubts it; if you look at the
18 Attorney General's statement in the Legislature when
19 he explained why he was using that phrase. I don't
20 have it right at hand but it is engrained in my
21 memory. He speaks not only of the criminal proceedings
22 that might flow, but also of the civil actions to
23 which Mr. Percival has made reference.

24 So it was for that dual purposes that
25 the phrase was obviously inserted in the Order in Council.

THE COMMISSIONER: Yes. All right.



H7

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2 Thank you. I think before we go on I should say
3 something about what our intentions are. There are
4 probably, I am now informed, no more witnesses that
5 the Commission intends to call in Phase I. I would
6 like at some point, probably after we complete Dr.
7 Bunt tomorrow to discuss all applications that anyone
8 has to require the Commission to call certain witnesses.
9 I also want to hear from all Counsel as to what
10 witnesses they intend to call. I have some control
11 over that because of course it must be only under the
12 Act, it must be only to call and examine witnesses
13 relevant to his interest. So you will have to prove
14 when you are calling a witness, that it is relevant
15 to your interest.

16 The reason I would like to get that
17 done as soon as possible is that as soon as that is
18 done we can then schedule argument. I think I would
19 like to be able to schedule it, if we know what
20 witnesses, if any, are still to be called, we know
21 roughly how long they are going to take. I can set
22 a date for argument on Phase I, and the sooner I set
23 that the happier everybody is going to be.

24 Now I still intend, unless everybody
25 tells me it is a futile exercise, to discuss the
question of - I don't think I will make the ruling but



H8 1
2 I would like to know who is applying for a stated
3 case in Phase II, and I think we will deal with that
4 question after we have completed this one and that
5 may of course, be this afternoon.

6 Now, I'm sorry, I keep forgetting you
7 Miss Rae. Do you have any comments to make on this
8 problem?

9 MS. RAE: No, I have not Mr. Commissioner.

10 THE COMMISSIONER: Miss Chown.

11 MS. CHOWN: Yes. Thank you Mr. Commissioner.
12 My comments will be brief because I think the four
13 speakers who have preceded me have canvassed the issue
14 rather thoroughly and I do not see that there is any
15 point in repeating it. What they have said has outlined
16 to you rather clearly the diversification of opinion
17 that you have in this forum before you as to what
18 the correct approach to Phase II would be.

19 In my view the difficulty can be
20 summarized as to how we apply the Court of Appeal
21 ruling to the mandate in the Order in Council to
22 investigate the circumstances surrounding the
23 investigation and prosecution of Susan Nelles.

24 What the speakers before me have
25 attempted to do is to say whether that part of the
Order in Council can be successfully divided into



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2 two parts. That is the examination of the
3 circumstances of what happened in the police investigation
4 and the prosecution. Secondly, as to any comments
5 you may have as Mr. Hunt phrased it, on your
6 view of the actions.

7 Thirdly, that whether you think they
8 should have done something different.

9 Mr. Hunt's position has certainly been
10 that you should be able to state what these
11 individuals did, that is the police, the Crown
12 Attorneys and Coroners; and further that you should
13 be able to go and say what you think about it.

14 THE COMMISSIONER: I wasn't sure it
15 was as clear as that. I am glad it was clear to you.

16 MS. CHOWN: I took these very clear
17 notes.

18 THE COMMISSIONER: Fine. All right.

19 MS. CHOWN: I am fairly simplifying
20 his views. Mr. Percival's views as I took it was
21 that you were not permitted to go on to offer any
22 comment because that strayed into the area of civil
23 and criminal responsibility.

24 THE COMMISSIONER: He made that very
25 clear.

MS. CHOWN: It is my view that Mr.



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Percival's view of the evidence is the appropriate one, and I am simply offering the practical observation that we are then left with a situation in which if Phase II is to really be a recitation of the facts that happened, we are left with you reporting on the chronology of events, and in fact if that is all you are able to do that would be something that could be done by filing of a statement of prima facie facts as was done with respect to Phase I, or a simple recitation of who did what on what occasion.

But to stray into such questions as to why those activities were done, Mr. Percival has already alerted you that he will take immediate exception to that as straying into forbidden territory of approaching or encroaching upon a conclusions of civil or criminal responsibility.

The other approach is to have the individuals called to give live evidence, but to do so only in chief and not in cross-examination, because in my view that would get us into difficulties. I don't think that is a very satisfactory state of events. Public perception has been raised by several Counsel and I think the public is not going to find it satisfactory if we begin on this exercise and are immediately faced with going and rushing to



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2 making representations to the Divisional Court on
3 a stated case. That will be the subject of numerous
4 editorials as to the continuing length of time this
5 Commission is taking.

H11 6 My final point is simply, I do not know
7 of what assistance it would be to all of us to
8 simply have a chronology of events given by live
9 witnesses. It may be that this problem as you
10 have suggested could be resolved, and I think it should
11 be resolved before embarking on Phase II by an
12 approach to the Lieutenant Governor in Council to
13 clarify the bounds of what was intended in the
14 Terms of Reference. Thank you.

15 THE COMMISSIONER: Thank you Miss
16 Chown. Miss McIntyre.

17 MS. McINTYRE: Thank you, sir, I will
18 try to be brief. I would like to state first that
19 I support Mr. Sopinka's position that really the
20 Court of Appeal decision has very little bearing on
21 Phase II, that is it is a very different type of
22 enquiry and the reasoning of course does not necessarily
23 apply.
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However, in the alternative, I would take the position that if the Court of Appeal Decision does apply, it should be applied consistently to Phase II as it was done in Phase I , otherwise, the perception will be that the Commission is somehow being less than even handed in the application of the court decision.

I would like to refer --

THE COMMISSIONER: You understand what the problem is. We didn't have the Court of Appeal Decision until the other day. I can well see what the opinion, what the appearance will be and I can well see what the letters will be but I want you to understand the difference and it is a very great difference. We didn't have the Court of Appeal Decision. Now we do have it and there is the difference that Mr. Scott pointed out and others pointed out , that there is no corollary issue involved here that we can justify the questions that went on in Phase I. There is no other issue.

The only issue we have here is to inquire into and report upon the investigation and the prosecution. If in the course of doing that -- I just want you to understand that. I don't expect that everybody is going to understand this and I don't



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2 expect that people won't understand that but you
3 at least, you at least can understand what the
4 distinction is and recognize it and appreciate it
5 and even conceivably speak to your clients about it.

6 So, I understand what will happen
7 and we are faced with this in this Commission all the
8 time. But I would like a little help from you on
9 this issue. If I do have to reach the conclusion
10 that there is a difference I want you to understand
11 it and I think it would be nice if you told your
12 clients something about it too.

13 MS. McINTYRE: : Certainly, sir.

14 THE COMMISSIONER: All right.

15 MR. McINTYRE: We will try to explain
16 your position.

17 THE COMMISSIONER: Unexplainable as it
18 is you will try to explain it, that's all. But you
19 are a lawyer, you can understand what I am faced with.

20 MR. McINTYRE: Yes, yes. It is a
21 very difficult problem, sir, and I appreciate that.
22 In fact, I would support going back for further
23 clarification and assistance on how the matter of
24 Phase II should proceed. I think that makes a lot of
25 sense because I think this is a very difficult problem
that we are confronted with.



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2 The point I was going to make sir,
3 is that I think the Court of Appeal has the direction
4 given by the Court of Appeal on page 18 of the decision,
5 makes it clear that you are obliged to hear all the
6 evidence --

7 THE COMMISSIONER: Relating to the
8 cause of death of the children.

9 MR. McINTYRE: -- relating to the cause
10 of death of the children, right.

11 THE COMMISSIONER: Because that is what
12 I am instructed to do.

13 MR. McINTRYE: And if that same
14 principle is applied to Phase II where the core issue
15 is not the cause of death but the circumstances
16 surrounding the investigation and prosecution, then
17 the application of that direction would again be to
18 hear all of the evidence.

19 THE COMMISSIONER: Even though I can't
20 make any comment upon it at all even though I can't
21 say whether what they did was good or bad?

22 MR. McINTRYE: Well, I will get to
23 that any moment, sir. But I think first there is
24 nothing in the Court of Appeal Decision that would
25 restrict you from hearing evidence and in fact it
goes the other way.



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2 THE COMMISSIONER: Remember, please
3 appreciate that there is another issue in Phase I.
4 There is only one issue in Phase II and should I hear
5 any evidence that I can't report on, should I hear
6 any evidence about the price of eggs in Peru or
7 something, when it's none of my business, when I'm
8 not allowed to comment about whether the price is
9 high or low, how can I hear evidence. This is the
10 issue.

11 Now, I am not determining the matter
12 but I want you to understand that I can't do what I
13 think is right, I have to do according to the law.
14 If I could do, every time in my life what I think
15 is right, we would have what is called anarchy.
16 Therefore, we have a law and laws are to be followed
17 by everybody and I have stated in the Judgement it is
18 more important for it to be followed by judges than
19 by anybody else. If I start deciding that I can do
20 anything that I want to do then justice has come to
21 a pretty pass. I have to follow the law.

22 I want you to help me in telling me
23 about what the law is. Do you understand? I don't
24 want you to tell me what you think I should do because
25 I know what I think I should do, I have no trouble
with that, with that issue.



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MR. MCINTYRE: I'm trying to do that,

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sir.

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THE COMMISSIONER: Yes, all right,

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thank you.

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MR. MCINTYRE : Perhaps I am failing miserably but I am trying.

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THE COMMISSIONER: No.

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MR. MCINTYRE: It seems to me that you are governed by the Order in Council as it may be affected by the decision of the Court of Appeal.

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THE COMMISSIONER: Yes.

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MR. MCINTYRE : And if I could deal with Mr. Percival's suggestion that the police should be called to give their side of the story and to give a recital of facts from their point of view and not be subject to cross-examination as to why they did or didn't take particular actions, I can't think that that can be the intent of the Attorney General or whoever drafted the Order in Council, that that would be a useless exercise.

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THE COMMISSIONER: Well, I am not far away from you on that.

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MR. MCINTYRE : So, that cannot be the correct position. It seems to me that what you can do is, you can hear all the evidence and there is,

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2 even if you cannot comment on the propriety of
3 conduct, there is a purpose to be served in hearing
4 all the evidence and the public has the right to
5 know the facts surrounding the investigation and
6 prosecution.

7 As far as your findings are concerned
8 it would be my position that you can comment on the
9 investigation. If there is a limitation, that is
10 where the limitation is imposed. You cannot go to
11 the extent of making findings that specifically
12 support a conclusion of negligence.

13 THE COMMISSIONER: Can you tell me
14 a finding that I could make that wouldn't support
15 a finding of negligence or non-negligence, can you
16 tell me any finding that I could make that would
17 be of any value? I suppose I can say that Policeman
18 X interviewed nurse Y on such and such a date and
19 she said Z. I can say that?

20 MR. MCINTYRE: Yes, you can certainly
21 to that far.

22 THE COMMISSIONER: And how much help
23 is that. And then I can say nurse Y said it was
24 quite different from what Policeman X said. Now, then
25 I really can't say, I almost can't say I believe
Nurse Y or I believe Policeman X on this question



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because to do so would indicate, would be a finding or might be a finding of fact which would assist the finding of negligence or non-negligence on the part of the police.

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MR. McINTYRE: Well, it would be my position, sir, that you can make such a finding, you just can't name names when you make such findings. That's what the Court of Appeal has stated at page 14.

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THE COMMISSIONER: Well, that's not really it. They say that the combination of the finding of fact plus the names creates the criminal responsibility. But in Phase II how can you prevent naming names because the names are there, they are the names of the policemen who have done this or have done that or the other thing or the names of the Crown Attorneys. As I have said this so often there are two Crown Attorneys. I don't know how many policemen there are but there are only two Crown Attorneys involved in this matter. I just don't understand how I can do it.

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MR. McINTYRE: Well, sir, there were a limited number of nurses in Phase I as well. But I would take the position contrary to what some of my friends have said that you can make findings that



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exonerate individuals and you can name names.

THE COMMISSIONER: I can make findings that exonerate people?

MR. McINTYRE: Yes you can, sir, in my submissions.

THE COMMISSIONER: Are we talking about what, Phase I or Phase II?

MR. McINTYRE: Phase II.

THE COMMISSIONER: Exonerate individuals?

MR. McINTYRE: Yes. Page 15 of the Decision of the Court of Appeal only limits you in naming names with respect to those facts which constitute a conclusion of criminal or civil responsibility.

THE COMMISSIONER: Supposing I exonerate the police, doesn't that affect the Nelles action somehow. If I said the police did everything properly, doesn't that affect the Nelles action?

MR. McINTYRE: Well, I would take the position that you can make findings that exonerate, you just cannot make findings that would lead to the conclusion of liability.

THE COMMISSIONER: Well, to a conclusion of non-liability, isn't that the same thing? I don't understand this, I just don't understand it. If I were



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2 to say that the police did everything properly, the
3 Crown Attorneys did everything properly, that's
4 exonerating them all. Doesn't that have some
5 effect on the Nelles action? I mean, isn't that the
6 same finding as what they want.

7 MR. MCINTYRE: Well, the affect on
8 the Nelles action is another issue, sir, but I would
9 take the position that all this prevents you from
10 doing is naming names where it results in a finding
11 of liability or responsibility.

12 THE COMMISSIONER: So, all it prevents
13 me from doing is naming names and you say that what
14 I can do is what, what can I do?

15 MR. MCINTYRE: Is that you can hear
16 all the evidence, including questioning as to why
17 actions were not taken by the police and that you can
18 comment on the evidence except that you cannot name
19 names.

20 THE COMMISSIONER: Please tell me how
21 I do that, please tell me how I do that? This is what
22 this is for is for help. Now, tell me how I can do
23 that. How will I do that. Now, for instance, I
24 simply say, do I name the name in the report at all?

25 MR. MCINTYRE: Yes, you can name the
names when you are reciting the facts.



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2 THE COMMISSIONER: All right, recite
3 all the facts, including the fact?

4 MR. McINTYRE: Yes.

5 THE COMMISSIONER: And what do I say,
6 I can comment on it?

7 MR. McINTYRE: Yes.

8 THE COMMISSIONER: And say I believe
9 one side and say I believe the other, I think they
10 did it properly or I think they did it improperly,
11 I can say all of that?

12 MR. McINTYRE: Well, sir, it is
13 difficult . I can see that it is a very difficult
14 task.

15 THE COMMISSIONER: It's an impossible
16 task.

17 MR. McINTYRE: Well, it may well be
18 and, therefore, I support the suggestion of going
19 back for further direction and clarification.

20 THE COMMISSIONER: Supposing I don't
21 get it, what then?

22 MR. McINTYRE: Then, sir, you will have
23 to going to make a decision.

24 THE COMMISSIONER: Then I have a problem.
25 Do you think I should go back for further direction
before I make a decision, do you?



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MR. McINTYRE: I do.

THE COMMISSIONER: Mr. Scott thought I should do it the other way around.

MS. McINTYRE: I think it is going to make it even more difficult for the Attorney General if you make a decision and then go and ask for direction as to whether or not you are right.

THE COMMISSIONER: Well, supposing he comes back and says, all right, I don't know, your the one you're the judge, you're the one that is suppose to know.

MS. McINTYRE: Well, sir, if he won't give you direction you're going to have to make a decision and the parties before you will have to act on that decision as they see fit.

I'm sorry I can't be of any further assistance to you.

THE COMMISSIONER: Okay, thank you very much.

Mr. Knazan, can you solve all this problem for us?

MR. KNAZAN: No, I have no submissions.

THE COMMISSIONER: All right.
Mr. Labow, you've got a solution I take it?

MR. LABOW: Not a solution, Mr. Commissioner.



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THE COMMISSIONER: Oh, all right.

MR. SOPINKA: Since these parties aren't going to be involved in Phase II --

MR. LABOW: Don't be that presumptuous Mr. Sopinka.

THE COMMISSIONER: Well, I know, it is easier to hear them than it is to argue with them, argue the question. Now, that's why I am doing it.

MR. SOPINKA: Well, can you put them on a time limit?

THE COMMISSIONER: I think Ms. McIntyre - Mr. Knazan was excellent, you can't complain about him and Ms. McIntyre certainly wasn't long:

MR. LABOW: Mr. Commissioner, as much as the parents that we represent would like you to hear all the evidence so that they can be clear as to what went on not only in the Hospital but once the police investigation began and the prosecution began I must agree with Mr. Percival's interpretation that you have to look at the Court of Appeal Decision as affecting the entire Commission.

The fact that they are split up into two hases is not something that the Lieutenant Governor in Council did but rather something that we did on our own for convenience and also so that the



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2 public would not perceive that evidence relating to
3 one question, that being how and by what means the
4 children died, also related to the second question
5 and vice versa.

6 Because of that I feel that the
7 Court of Appeal Decision has affect on both portions
8 because it is really only one Commission. There may
9 be two distinct inquiries as Mr. Sopinka set out, but
10 it is all in your terms of reference and it is one
11 proceeding.

12 While the Attorney General when he
13 introduced this Commission made it clear that it
14 should be very public and hopefully it would answer
15 a number of questions, although it may not answer
16 all of them, and therefore, he wanted a full public
17 inquiry, it seems clear to me that the Court of Appeal
18 Decision has left you inan impossible position
19 regarding Phase II and that you really have very
20 little to do because you cannot, I submit, hear
21 evidence that you cannot report on.

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2 The submission that you can hear the
3 evidence and that you can do a number of things,
4 although the Court of Appeal Decision is there facing
5 you, I feel is not a correct interpretation. They
6 made it very clear, notwithstanding the submissions
7 made to them and your own decision that you can not make
8 a number of findings and choose not to make other findings
9 of fact, that you don't have that discretion, that the only
10 thing that you can't do according to their decision,
11 is name names and it would seem to me that that
12 would apply as much in Phase II, as it does in Phase I.

13 Those are really all our submissions
14 on that issue, Mr. Commissioner, but I would like
15 to state that until we understand the scope of
16 Phase II I, for one, am in no position to argue
17 whether we want status or whether we should have
18 status in Phase II. If I knew or had an idea where
19 you were intending to go and if I thought that
20 Phase II was going to deal with certain areas then
21 I can tell you that we would be asking for status
22 to look into certain aspects of the police investigation
23 and the conducting of the prosecution, but until we
24 know what is going to go on I don't feel we are in
25 any position to do that.

THE COMMISSIONER: Could you not argue



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2 it on the basis of the one most favourable to your
3 status?

4 MR. LABOW: I could do that and I
5 am quite prepared to do that. It is not a very
6 long argument.

7 THE COMMISSIONER: No, but I would
8 like you to do that, because I would like to get
9 that over with. I would like anybody, and it would
10 obviously be this afternoon that we would do that,
11 but just assume a most favourable position and argue
12 for status and we will see. We may have to have
13 further argument. I don't want to have to go through
14 that problem again.

15 MR. LABOW: I will do that. I have
16 no problem with that.

17 I would
18 also like to suggest that you might go back to the
19 Lieutenant Governor in Council in order to try and
20 clarify this issue, because in your original terms
21 I thought it was quite clear that the Lieutenant
22 Governor in Council had indicated there was a need
23 for the parents of the deceased children and the
24 public to be informed of all evidence,
25 not only to the deaths,



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2 but in that same sentence, also to the proceedings
3 arising therefrom.

4 I know that my clients would still
5 like the opportunity to know exactly what went
6 on with regard to the proceedings arising therefrom
7 and any clarification from the Lieutenant Governor
8 in Council or amendment to these terms would be
most welcome.

9 THE COMMISSIONER: Yes. You see,
10 one of the reasons why I would like to hear the
11 arguments now on this are that I am thinking of
12 Court proceedings. I may decide that you have no
interest, no direct or substantial interest.

13 MR. LABOW: I understand that.

14 THE COMMISSIONER: If that is so
15 and if you decide to dispute this matter in the
16 Courts I want that to be done immediately so that
17 this problem, I will not be faced with this problem
18 when we finally get around to Phase II. I want to
19 get as many of these problems cleared out of the way
20 as possible.

21 MR. LABOW: I understand that,
22 Mr. Commissioner.

23 THE COMMISSIONER: I am setting aside
24 this afternoon for anyone. I have given, I hope,
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2 notice to everyone and there may be some other
3 people, besides those who are here, who want to
4 come in and I want to be able to consider that so
5 I can decide that and get that out of the way and
6 while we are arguing Phase -- or contemplating the
7 argument for Phase I, and perhaps while I am even
8 writing the first chapters of Phase I, the Courts
9 can have that little task to be set aside and to
be resolved. All right.

10 MR. LABOW: Thank you.

11 THE COMMISSIONER: Thank you.

12 Mr. Tobias, you are next.

13 MR. TOBIAS: Mr. Commissioner, I can
14 adopt much of what my friends, who have preceded
me, have already said this morning.

15 THE COMMISSIONER: You can't adopt
16 it all, I can tell you that. You have to take one
17 side or the other.

18 MR. TOBIAS: I think it would be
19 rather difficult, given the rather competing points
20 of view that have been put forward, to adopt it all,
21 but I would like to specifically agree with
22 Mr. Percival. I think in fairness the Court of
23 Appeal Decision clearly has to be applied to Phase II
24 and to the considerations in Phase II in exactly the
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2 same manner in which it was applied to Phase I.

3 I didn't read the Court of Appeal
4 Decisions, as laying down different rules with
5 respect to the two Phases.

6 Mr. Scott engaged you this morning
7 in a brief discussion about hypothetically the question
8 of the conduct of the nurses and I was concerned about
9 one observation that was made. Clearly I think if
10 you were to make comments upon any of the conduct
11 of any group, including the nurses in Phase II, that
12 could very directly affect them, as a group, with
13 respect to criminal liability, because I have always
14 understood that it was open for a party who refused to
15 cooperate if they have gone far enough in that
16 refusal to be charged with Obstruction of Justice.

17 THE COMMISSIONER: Well, I think you
18 have to take some actual outright step. I don't
19 think -- I have never heard of anyone, merely by
20 declining to assist, being charged with either
21 criminal or civil responsibility or it could even
22 be classified as misconduct. I don't know, however,
23 I will have to argue that out with Miss McIntyre.

24 MR. TOBIAS: With that one issue, sir,
25 perhaps I might have been hearing wrong for the past
three of four months, but I could have sworn that on



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2 numerous occasions there was some innuendo that
3 perhaps some pact was made or some covenant was made
4 or some active step was taken to put forward a
5 particular story, but let me move on.

6 THE COMMISSIONER: I have asked that
7 that be clarified.

8 MR. TOBIAS: I just wanted to make
9 the point that I think their interests are affected
10 as well.

11 With respect to the comments that
12 have been made about hearing all of the evidence
13 and your observation that, yes, but that only applied
14 to the cause of death, I think it is important to
15 note that they were really as a result of your
16 original ruling, two issues in Phase I. Not only
17 how did the babies come to their death, but if you
18 could on the evidence express a conclusion, who might
19 be implicated in that death. So I think it was fair
20 game, once the Court of Appeal Decision came down,
21 to say, well, we can still hear all the evidence
22 as long as we don't name a name. It is almost
23 impossible to do that in Phase II, because, sir, as
24 I perceive it, Phase II has one issue and one issue
25 only and that is the conduct of the police and the
Crown Attorneys in their investigation and their



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2 prosecution of charges against Mr. Sopinka's client.

3 It is obvious that at this stage we have all
4 done a marvellous job in indentifying the problem,
5 but I don't think anyone has proposed a solution.
6 I don't certainly have a solution. But I would like
7 to point out, though, something Mr. Justice Krever
8 said in the Divisional Court. In the opening line
9 of his judgement he made the observation:

10 " It was hard to imagine any case
11 in which the competing interests of
12 the various parties could clash more
13 resoundingly. "

14 If we needed any reminder of that we have certainly
15 seen it here this morning.

16 It is clear to me that Mr. Percival's
17 position, on the one hand, and Mr. Sopinka's position,
18 on the other hand, are entirely at cross purposes
19 and can't possibly co-exist, so that your dilemma,
20 as I see it, is that you simply cannot proceed without
21 some kind of clarification. You can't even begin
22 to hear the evidence without some kind of clarification
23 and you have two choices as to how you can get that
24 clarification. You can make a ruling, and I would
25 imagine that either way you will be asked to state
a case and ultimately it is something that the Court



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2 of Appeal will rule on, which clearly is not a happy
3 thing to contemplate when you stop to think of the
4 time, the delay and the cost involved in that, or
5 you can, as you suggested this morning, go back to
6 the source, to the Lieutenant Governor in Council and
7 you can ask him to clarify.

8 Now, other than adopting those two
9 approaches the only thing, the only other thing you
10 can do, as I see it, would be to advise the Lieutenant
11 Governor in Council that, given the language contained
12 in the Terms of Reference, and given the conundrum
13 created by your reading of the Court of Appeal
14 Decision, that you can't proceed and you can't make
15 any report with respect to Phase II and, in fairness,
16 I don't think that is an attractive alternative
17 either.

18 It has been suggested here that
19 perhaps you should make a ruling and then ask the
20 Lieutenant Governor in Council to give clarification.
21 My concern on that point is that were you to do that
22 you would, in effect, almost be asking the Attorney
23 General to serve in some sort of an appellant function.
24 If you make a ruling and that ruling needs clarification,
25 clearly the people to give you that kind of direction
and that kind of clarification in this proceeding would



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2 be the Divisional Court and beyond that the Court
3 of Appeal.

4 I have nothing other than that I can
5 usefully add, except to say to Mr. Sopinka that if
6 there is no Phase II he may not have standing either.
7 Thank you, sir.

8 THE COMMISSIONER: Yes. All right,
9 thank you. Now, Mr. Shanahan.

10 MR. SHANAHAN: Mr. Tobias, having
11 gone before me, sir, I think I can adopt what he
12 has said here. This afternoon on that other issue
13 I will ask to go before him.

14 THE COMMISSIONER: Mr. Shinehoft.

15 MR. SHINEHOFT: I intend to be very
16 brief, Mr. Commissioner, as I usually am, especially
17 with Mr. Sopinka beside me.

18 MR. SOPINKA: Very good, you are
19 learning.

20 MR. SHINEHOFT: I would like to
21 allude to something that I did refer to before in
22 our previous discussion and that is in regard to
23 the Court of Appeal Decision, which part of that
24 Decision is obiter dicta and which part of that
25 decision might be construed as ratio decidendi.

I argued at that time that I felt it



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2 would be important to make that distinction and
3 I still say that. There are certain things that
4 are discussed here, certain issues that are raised
5 here that were never even argued in the Court of
6 Appeal, so how can one say that certain parts of
7 a Judgement of the Court of Appeal are applicable to
8 the second part, or Phase II, when the issues were
never raised in the Court of Appeal?

9 Secondly, the question is if you are
10 so restricted in what you can do in Phase II, and
11 I think you have put it fairly, what is the purpose
12 and sense of Phase II if it is merely a recitation
13 of facts and information that has been brought out
14 in previous proceedings or if it is what some people
15 might construe as glorified Examinations for Discovery,
16 and a malicious prosecution, then it serves
no use at all.

17 I would say, thirdly, Mr. Commissioner,
18 that I agree wholeheartedly with the people that have
19 come before you and said to you, let us ask the
20 Attorney General for clarification of the issues and
21 what did he mean by the Order in Council. There is
22 one other possibility as well. That is to go back to
23 the Court of Appeal. My submission is that they are
24 not yet functus.
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2 THE COMMISSIONER: I think the Order
3 has not been taken out; is that right?

4 MR. SHINEHOFT: My understanding is
5 I certainly haven't approved any Order.

6 THE COMMISSIONER: I don't think they
7 would receive it, I may be wrong. I don't think they
8 would consider that, because the matter was not put
9 before them and they would say that they want to have
10 they would have a right to say that they want to have
11 the benefit of my reasons and they would want to have
12 the benefit of the Divisional Court's reasons. It
13 is an entirely different issue before they decide on
14 it. I would think that would be the answer.

15 MR. SHINEHOFT: I say this, Mr.
16 Commissioner: you have come here and you have said
17 that I have got a problem and we agreed that you have
18 got a problem. I am saying to you that there are
19 certain avenues, certain approaches that we might
20 be able to take to help us resolve this problem and
21 surely if the Court of Appeal would entertain further
22 argument or would give further clarification to
23 their Judgement on what exactly they meant, as far as
24 the applicability of the Judgement, vis-a-vis Phase
25 I and Phase II, then this would, in my respectful
submission, help you very much in trying to frame



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2 exactly what the decision might be.

3 THE COMMISSIONER: It would more than
4 help me, it would tell me. I don't think they would
5 do it, that is all.

6 MR. SHINEHOFT: Well, I think there
7 is a phrase, "There's no harm in asking."

8 THE COMMISSIONER: I don't know.

9 MR. SHINEHOFT: At the very least I
10 would suggest, and I agree with the predecessors
11 before you this morning, that we should ask the
12 Attorney General for clarification and this should
13 be done before a decision is made by yourself and
14 hopefully this can be done in a very expeditious manner
15 and that if amendments have to be made to the Order
16 in Council that they can be made so that we can
17 continue on with Phase II, because the public and
18 the parents have a huge investment in these proceedings
19 to date and it would be a shame, indeed, if a full
20 hearing could not be made, as to exactly what happened.

21 Those are my submissions.
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THE COMMISSIONER: Yes. All right.

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Before I call on Mr. Lamek I want to ask Mr. Percival a question, what is your view of going back to the Attorney General?

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MR. PERCIVAL: Mr. Commissioner, back on April 18th I asked you perhaps that could be something you might do with respect to Phase I.

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THE COMMISSIONER: But not having done it with respect to Phase I. The reason I didn't do it with respect to Phase I was that Mr. Hunt argued against that in the Court of Appeal, and that was a useless exercise.

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MR. PERCIVAL: If you didn't do it, with respect to Phase I why would you do it with respect to Phase II.

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THE COMMISSIONER: That is a good rhetorical question and I have no answer to it. All right. Now Mr. Lamek.

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MR. LAMEK: Mr. Commissioner, I first of all am instructed by Miss Cronk to resist Miss Chown's suggestion that we have some of the statements of prima facie facts whatever happens in Phase II.

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Mr. Commissioner, with the best will in the world I don't think I can be of very much assistance to you. I don't have the answer to this.



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Indeed I don't ~~propose~~ to take a position about what is permissible in Phase II under the Terms of Reference as they have been construed by the Court of Appeal.

I have listened to the debate and I am obliged to say I see merit and defects in both of the opposing positions that have been advanced to you.

It does seem to me at this stage, sir, that before embarking on Phase II one really needs to consider not what may eventually prove to be the correct view of your mandate, but really what is practical.

The question of the appropriate scope of enquiry and reporting Phase I arose at a time when we were well into the Phase and the evidence. We are about to embark on something rather new, and in my submission it makes a great deal of sense to map out, if possible, where we are going before we set out.

In my submission it is indeed arguable, as Mr. Sopinka has suggested, that the Court of Appeal Judgment should be read as applying primarily to Phase I, and not as a blanket prohibition against the naming of names, or against commenting on the conduct of persons in Phase II, subject of course to the injunction that is contained in the Terms of Reference which applies equally to paragraphs 3 and 4



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2 of the Terms of Reference.

3 Indeed I might say that seems to have
4 been assumed from the start long before the naming
5 of names became an issue in Phase I, that you were
6 indeed permitted to comment in Phase II about the
7 inadequacy, or inadequacy of propriety, or impropriety
8 of the actions of the police and the Crown Attorneys
9 when you came to Phase II.

10 The approach of not only my learned
11 friend Mr. Percival, but Mr. Hunt as well, seemed
12 to be premised upon that long before the issue had
13 been squarely raised. I do see the argument that has
14 been advanced primarily by Mr. Sopinka as being
15 an arguable position.

16 I have to concede also Mr. Commissioner,
17 in my submission, it is also arguable and of course,
18 this is a concern that you have expressed, that the
19 effect of the Court of Appeal Judgment is to prevent
20 your making any comment lauditory or adverse on the
21 conduct of persons in Phase II. That you are
22 restricted to hearing evidence only as to what was
23 done in order that you may compile a chronology of
24 events.

25 One might properly wonder whether such
utility to the public as that exercise might have

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2 justified the use of your time and talents and the
3 cost of doing it.

4 At the end of the day in my submission
5 it comes to this, that each of those positions is
6 arguable, but unless there is either consensus
7 or clarification as to exactly what you may or may
8 not do, to embark upon Phase II is clearly to invite
9 dispute, delay and bluntly, frustration. Mr. Percival
10 has forthrightly given notice of his intention and
11 I recognize the force of his position and the
12 validity of his position. He is maintaining an
13 eminently arguable position and he is prepared to
14 have it tested. One cannot possibly be critical of
15 him for letting it be known that he proposes to have
16 it tested if it comes to this.

17 Therefore, Mr. Commissioner, to embark
18 on Phase II without clarification is to do what we
19 all advise our clients not to do, is essentially to
20 buy a law suit. To proceed in the constant state
21 of uncertainty would not in my respectful submission be
22 sensible. I know it was in the hope that the
23 uncertainty might be removed that you invited all
24 Counsel to make submissions to you today. There
25 clearly is a full range of views as to what you may
or may not do, and sadly there is no prospect of a



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2 consensus among all Counsel. There is little point
3 in my stating a view as to what the possible scope
4 of Phase II is in my view.

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5 As I have said any such position would
6 be no more than arguable. It is my submission it
7 would be unwise to proceed on such a course. Whether
8 clarification be sought by request to the Lieutenant
9 Governor in Council or by the stating of a case on
10 your own motion, sir, under the Public Enquiry Act, is
11 a matter that will be debated and which at the end
12 of the day you may perhaps resolve.

13 In my submission if it is possible to
14 clarify the permitted scope of the enquiry before
15 embarking upon it, it should be done. The positions
16 as I have listened to them today are irreconcilable,
17 and in that situation to embark upon Phase II would
18 be to embark upon what surely is a very short lived
19 exercise before we find ourselves elsewhere seeking the
20 clarification which might as well be sought now.

21 THE COMMISSIONER: Yes, all right.
22 Thank you. Now Mr. Sopinka and Mr. Hunt I promised
23 you a last short word.

24 MR. SOPINKA: Yes, I won't be very
25 long. I submit that the cleanest way for you to
decide this is that the Court of Appeal Judgment does



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2 not apply to Phase II, and Phase II is different in
3 the manner in which I have indicated, and the names
4 are known; that you can determine the circumstances even
5 though that may result by reason of the circumstances
6 of persons being identified. You would not be
7 identifying them. You have mentioned on a couple of
8 occasions that there is no corollary issue in Phase II.
9 In my submission there is.

10 You can't determine the circumstances
11 surrounding the investigation, institution and
12 prosecution of the charges.

13 Now in Phase I you can determine how
14 and by what means the children came to their death.
15 The responsibility would be fixed by you if you
16 identify the perpetrator, that is what the Court of
17 Appeal said.

18 In Phase II the mere fact that the names
19 are known; if you merely determine the circumstances
20 of the investigation you would not be determining the
21 criminal or civil responsibility. The Order in Council
22 says that you are not to determine that. The mere
23 fact that people know that so and so did this would
24 not mean that you - the prohibition is against you
25 and your report.

THE COMMISSIONER: Even though I rejected



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2 that at the beginning in Phase I. I can't just
3 simply say that because my decision will not be binding
4 upon the parties, therefore I can make any decision I
5 like. Even I projected that in my Reasons and the
6 Court of Appeal rejected it again. I can't say the
7 police were sloppy, or even that they were malicious,
8 I can't say any of those things, because it will surely
9 be a finding of fact, at least in my reading of it,
10 a finding of law, if I said anything like that. What
11 the Court of Appeal is saying, if I say in practice
12 that it constitutes a finding of law, with or without
13 the statement of law, then I have gone too far.

13 MR. SOPINKA: Yes, but that is only if
14 you express an opinion as to who did it. The
15 prohibition, and I think this has been lost sight of,
16 is that you are not to express any conclusion of law
17 regarding civil or criminal responsibility. Now if
18 you say something in your report that in itself
19 does not amount to a conclusion, but because people
20 know other circumstances, you are not expressing any
21 conclusion, other people are drawing the conclusions.

21 THE COMMISSIONER: You are asking me to
22 be sneaky.

22 MR. SOPINKA: No, I am not. I am asking
23 you to interpret, with respect, I am not suggesting
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2 there is anything sneaky about that.

K8 3 THE COMMISSIONER: Well it certainly
4 is if I say - if I tried to sneak it in in some way
5 so only the subtle reader can follow it.

6 MR. SOPINKA: I am not suggesting any
7 reader. You are prohibited in your report from
8 expressing a conclusion of law respecting civil
9 or criminal responsibility.

10 In Phase I, if you determined questions
11 of fact that were germane to a criminal prosecution,
12 or a civil action and named names, you would then be
13 expressing a conclusion of law in your report.

14 Now in Phase II, it so happens that the
15 circumstances are that the names are known. The
16 Attorney General or the Lieutenant Governor in
17 Council knew that when they drafted this thing. So
18 they obviously did not intend for it to be a completely
19 barren examination. So when they determined that
20 you were to report on the circumstances surrounding
21 the investigation, obviously they intended that you
22 could relate those circumstances as long as you did
23 not express any conclusion of law in civil or
24 criminal responsibility. So I say there is a
25 corollary matters in Phase II, and that is that you
can deal with the circumstances. It so happens that



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2 those circumstances may lead the public to conclude
3 that certain people did it, but they might have done
4 it in Phase I too. As has been pointed out there
5 are a limited number of nurses involved. If you
6 said it was murder, they might conclude that in that
7 case too. In fact there are probably more persons
8 involved in Phase II than there were in Phase I that
9 were in the category of suspects.

10 Now I think Mr. Scott's argument,
11 although he didn't intend this, demonstrates that
12 the Court of Appeal could not have been intending
13 their Judgment to apply to Phase II. He referred you
14 to page 15 of the Decision in which the Court of
15 Appeal appears to have said that you don't have a
16 discretion to exclude certain elements from your
17 findings. That if the evidence warrants finding
18 that there was a certain state of mind relating to
19 the cause of death, etc, then you were to make that
20 finding.

21 Now given the facts that the names
22 were known, surely they could not have been intending
23 that to apply to Phase II and still say that you
24 can't determine criminal responsibility. Because if
25 the argument is right that the fact that the names
are known, even though you don't put them in your



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2 report, and then you make a finding of fact, if that
3 amounts to determination of civil or criminal
4 responsibility; then what the Court of Appeal, if
5 they intended that to apply to Phase II, have said,
6 you are to determine criminal responsibility in
7 Phase II.

8 Because they knew that the names were
9 known. If they say well you have got to determine
10 intent if it is warranted in the evidence, they
11 would really have been saying in Phase II that you
12 have to determine criminal responsibility and
13 obviously that would not have been their intent and
14 that demonstrates that they didn't intend that to
15 apply to Phase II.

16 Now as to the approach to the Attorney
17 General, may I say with respect that I agree with
18 Mr. Scott that what you have to do is determine
19 what the Order in Council says. Because I do not
20 think that you should - or I submit that you should
21 not ask the Attorney General or the Lieutenant
22 Governor in Council for clarification.

23 THE COMMISSIONER: Can't I say that
24 regardless of what I decide we are heading into the
25 Courts unless he clarifies it because this is what
is going to happen. If I decide, if I decide that



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the Court of Appeal Decision does apply to Phase II
as well as Phase I, then I may well find that - I am
sorry if I find that it applies to both then I may
well find that you are dissatisfied in that and you
may haul me before the Divisional Court for appropriate
disciplinary procedures.

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And if I decide the other way Mr.
Percival is going to take me there.

Now, it may not be immediate, you
withhold your fire until the first question on
cross-examination but it is going to come sometime
and isn't it better to tell him this is what we
are heading for, we are heading for at least a six
month delay and, I might add, I wouldn't have any
of the inhibitions about going to the Supreme Court of
Canada if we haven't had any of the evidence and
we hadn't started with the whole procedure either.

So, if the decision was not according
to my taste but the other problem is I may find
myself forced to make a decision in this matter that
goes against the grain as what I would like to have
happen.

MR. SOPINKA: I have the
solutation .

THE COMMISSIONER: All right.

MRL SOPINKA: Because I suggest that
if you go to the Attorney General first of all and
say I haven't decided what this means but clarify it
he will probably say, well, there is a machinery in
the Public Inquiries Act for having these matters



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2 dealt with, I don't get into the act until that has
3 been exhausted. He might not say that. Supposing he
4 doesn't say that and comes back and clarifies it
5 I might be dissatisfied with the clarification, we
6 might still go to the Divisional Court and then look
7 at the position the Court is in.

8 THE COMMISSIONER: But you can't go to
9 the Court. If it is clarified, you can't ask the
10 Divisional Court to upset what the Lieutenant Governor
11 and Council decided.

12 MR. SOPINKA: Well then, I will come
13 and say --

14 THE COMMISSIONER: You can ask but
15 you won't get it, I can tell you that. No, you can
16 get me reversed but you can't get the Lieutenant
17 Governor in Council reversed.

18 MR. SOPINKA: No, because I will do it
19 through you. When he comes back and says this is
20 what it means I will say no it doesn't. He's not
21 the court. Unless he amends the Order in Council --

22 THE COMMISSIONER: He will have to
23 amend it, there is no point. His expression opinion,
24 while extremely valuable, is not anything that is
25 going to bind me.

MR. SOPINKA: Well, we are in agreement.



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What you should do is ask him to amend.

THE COMMISSIONER: Ask him to amend.

MR. SOPINKA: To do what you say should be done in this inquiry; in other words there is ample precedent for a Commissioner asking for the terms of reference to be amended to deal with the subject in the way that it appears it should be dealt with, the Commissioner now being in a better position perhaps than the Attorney General to determine how the subject should be dealt with and there is ample precedent of that being done, the terms of reference being extended.

I agree with you that I don't think it is essential for you to make a decision, although, it might be rather difficult to tell him to extend an Order in Council when you haven't told him how you think it is limited.

THE COMMISSIONER: I will send him the transcript.

MR. SOPINKA: You see, he may say to you, well, why should I extend it, you haven't told me it's limited.

THE COMMISSIONER: I will tell you what, I will ask Mr. Hunt to whisper in his ear what the problem is and maybe he will get through.



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2 MR. SOPINKA: So, it should be made
3 clear that it is an amendment to the terms of
4 reference to clarify it so as to enable this to be
5 a full and meaningful inquiry into those circumstances.
6 You know, we have been hearing about the police being
7 placed in jeopardy, I don't know whether this comes
8 from a sense of guilt or what, but if it goes the
9 other way it is just as serious for my client.

10 MR. PERCIVAL: With respect, that is
11 a little bit much, Mr. Commissioner.

12 THE COMMISSIONER: I agree. Well, I
13 know, but we are being a little frivolous today sometimes
14 and I can understand that.

15 MR. SOPINKA: But in other words it
16 works both ways. If you determine in Phase II --
17 It is just as serious for my client and I am prepared
18 to take the risk. If you say they were perfectly
19 justified in laying the charges that impacts on her
20 rights as well as the police.

21 THE COMMISSIONER: Mr. Percival's
22 point is that the perpetrators, if there are such
23 people, have been protected, the police have not, that's
24 all. If you interpret it one way that's what's going to
25 happen.

MR. SOPINKA: Well, they may have been



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protected by not having the perpetrators in Phase I identified, they might have charged the wrong perpetrator. I'm not so sure that was a bad thing for them.

Those are my submissions.

THE COMMISSIONER: Yes, all right.
Thank you. Mr. Hunt, do you have anything to add?

MR. HUNT: I have nothing to add, sir.

THE COMMISSIONER: All right, thank you. Well, I think we will rise now and we will see what the position is at, I guess, 2:30 we will see what the position is on representation. I know it seems premature but I want to get that problem resolved to before we start.

Now, it is not going to hold up Phase II that much no matter what happens because we have still a lot of work to do in Phase I. Whether we have any more witnesses or not, I want people to be preparing argument, argument has to be given. If we haven't got Phase II resolved at that point then I have a task before me that can keep me occupied and out of trouble until we do.

Yes.

MR. TOBIAS: Mr. Commissioner, I'm shaking my head because with respect to my friend,



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2 Mr. Labow, he may have conceded too much. I really
3 have a great deal of difficulty in deciding in my
4 own mind not only how I can argue the question of
5 standing in Phase II but how I can even get intelligent
6 instructions from my clients. I am at a complete
7 loss as to what Phase II is?

8 THE COMMISSIONER: Well, I asked you
9 to assume the one that is most favourable to your
10 position, your request for a standing. That I'm
11 going to ask you to do because I want to get this
12 problem resolved.

13 Anyway, let's fight about it at 2:30
14 this afternoon.

15 MR. TOBIAS: All right.

16 --- Lunch Recess
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---Upon resuming at 2:30 p.m.

THE COMMISSIONER: Now, I suppose the first question I should ask, I had assumed that Susan Nelles, the Attorney General, and the police and perhaps the Hospital are seeking standing in Phase II, am I correct?

MR. HUNT: Yes.

MR. BROWN: Yes.

MR. ROLAND: Certainly that is correct, sir.

THE COMMISSIONER: Well, I won't ask you to argue unless someone opposes that application. Does anyone have any opposition to the application of those four parties?

Now, can I hear from anyone else who seeks standing?

MS. RAE: Yes.

MS. CHOWN: Yes.

THE COMMISSIONER: Yes, all right, Miss Chown.

MS. CHOWN: I don't know whether you're including me in that.

THE COMMISSIONER: Well, I wasn't, really.

MS. CHOWN: I simply come before you



AA-2

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2 to say that at the moment like everyone else I do
3 not have knowledge as to whether --

4 THE COMMISSIONER: Assume.

5 MS. CHOWN: Assuming that the police
6 are going to make reference to information they
7 expected to receive from the doctors and did not
8 or information they received from the doctors and
9 acted on and perhaps to their detriment, it strikes
10 me that my clients will be involved. They were
11 certainly involved, numerous of them, in police
12 interviews.

13 THE COMMISSIONER: No question that
14 if any of your clients attend on Phase II, although
15 most of your clients were questioned both on Phase I
16 and Phase II I think, were they not?

17 MS. CHOWN: I think the line was
18 drawn fairly carefully with the doctors and we didn't
19 get too much into Phase II.

20 THE COMMISSIONER: No, you are quite
21 right, you are quite right. We started I think with
22 the nurses, didn't we?

23 MS. CHOWN: Yes.

24 THE COMMISSIONER: Well, you will have
25 to be present but do they have, in the issue itself,
do they have any, what is it, substantial and direct



AA-3

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2 interest? 'Substantial and direct interest in the
3 subject matter of this Inquiry.'

4 What would be your concern? I wonder,
5 the famous question I was to put to Mr. Hunt and
6 to Mr. Young, are we going to have an answer on it
or not?

7 MR. HUNT: I am certainly prepared to
8 give you the answer as much as I can but I don't
9 think it is going to be that helpful.

10 THE COMMISSIONER: That helpful.

11 MR. HUNT: No, maybe not.

12 MR. ROLAND: Sir, before the answer
13 is given I am a little concerned at the question and
14 I am more alarmed if there is going to be an answer,
15 if it is critical of any of the individuals that were
16 employed at the Hospital and they are named or the
17 Institution itself and it is named, in Mr. Hunt,
18 or Mr. Percival, or Mr. Young in his place, setting
19 out their theory of Phase II, you asked them to set
out their theory of Phase II in order to assist you
in deciding on standing of various individuals.

20 THE COMMISSIONER: That's right.

21 MR. ROLAND: And you have asked them
22 to come before you and flush out that
23 theory and I take it in the course of doing so they
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AA-4

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2 will indentify individuals or groups of individuals
3 and their criticism, if they have any, of those
4 individuals or groups in the course of the investigation.

5 Now, I am concerned if that is done
6 in public - I am not concerned if it is done in-
7 camera but I am concerned if it is done in public,
8 as things stand today, because we don't know what
9 the ambit of Phase II is going to be and it may be
10 very unfair to those individuals to be named publicly
11 today in criticism of them, although, they may never
12 have a chance to answer that criticism. I am concerned
13 that the prejudice that that may cause in a public
14 forum such as this.

15 So that I am interested in knowing
16 what their answer to the question is, I think it should
17 not be in public.

18 MR. YOUNG: Mr. Commissioner, let me
19 say that should my friend not have addressed that point, I
20 would have. We have similar concerns and I don't
21 mean to be difficult but I don't think it would be
22 fair for us to outline our theory and who indeed needs
23 to be present because that's tantamount to saying that
24 those individuals might have done something wrong.

25 THE COMMISSIONER: Are you satisfied
to have all Counsel present when you address this?



AA-5

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2 MR. YOUNG: Sure, I have no problem
3 with that, Mr. Commissioner.

4 THE COMMISSIONER: Well, is there
5 anyone here who is seeking standing who has not had
6 standing in Phase I?

7 Well, no one seems to be, so, we have
8 no problem that way.

9 Well, I guess if I had thought this
10 out. There are so many things that if I had just
11 thought things out ahead of time it would have made
12 things a lot easier and we would have met someplace
else at 2:30 instead of here.

13 Yes, Mr. Tobias?

14 MR. TOBIAS: The parents and some of
15 the other people are going to be in a very similar
16 kind of difficulty. You have asked us to argue based
17 upon certain assumptions that the way the Terms of
18 Reference are going to be interpreted are in the
most favourable light.

19 THE COMMISSIONER: Yes.

20 MR. TOBIAS: Now, when I get into that
21 I may inadvertently be telling you something about my
22 thoughts and my theories and naming certain individuals,
23 or at least certain Institutions, and I am also
24 concerned that I not do them any public prejudice.
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2 For that reason, it occurred to me
3 that perhaps it would have been better had we had
4 these arguments in-camera.

5 THE COMMISSIONER: All arguments? We
6 have the whole question of standing done in-camera,
7 is that what you're suggesting?

8 MR. TOBIAS: Well, I am suggesting it
9 would certainly help in answering my fears about doing
10 prejudice to people whom I may find it necessary to
11 refer to and try to communicate to you why I think
12 my particular clients have some substantial and direct
13 interest in Phase II.

14 MR. SHANAHAN: Well, sir, if I might
15 on behalf of those whom I represent. I can see the
16 problems Mr. Roland and Mr. Young are addressing them-
17 selves to and that prejudice should perhaps be
18 protected by those questions being made clear perhaps
19 in-camera. But I want to be fair that from my part,
20 in addressing the issue whether my client should have
21 standing in Phase II, I distinctly wish it here, I wish
22 it to be on the public record and I want to be clear
23 on that, sir.

24 THE COMMISSIONER: Yes, Miss McIntyre?

25 MS. MCINTYRE: Sir, since the allegations
with respect to Phase II to a large extent have already



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2 been made public against that, I am not as concerned about
3 that but that I would certainly want arguments on standing to
4 be made in public.

5 THE COMMISSIONER: Well, supposing
6 we have the questions answered in-camera, which will
7 take I would think at the most two or three minutes,
8 am I right? And even with questions that I will
9 be putting to Mr. Hunt to try and tell me once again
10 to see if I understand it, even with all of those it
11 would just take us not more than ten minutes and then
12 we could come back here and argue for standing and
13 all I would be able to do is try to remember.

14 Now, obviously, Counsel are going to
15 have to be able to speak to their clients to take
16 instructions because of what their position is.

17 Has anybody any wild objection to
18 that procedure?

19 MR. YOUNG: Sir?

20 THE COMMISSIONER: You do?

21 MR. YOUNG: No, I don't object to this
22 but I know you are not going to be too fond of this
23 comment. Might I suggest that we are a little
24 premature at this stage.

25 THE COMMISSIONER: No, you are quite
right. We are premature except for this fact that it



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2 is an issue that is going to be raised and I would
3 like it to be raised and get it out of the way as
4 soon as possible, otherwise, we are looking at 1999
5 for the commencement of Phase II.

6 MR. YOUNG: Unfortunately whether or
7 not we discuss this this afternoon, I am not certain
8 whether it is going to start before 1999. I don't mean
9 that in a facetious way. I think we have some
10 serious obstacles to overcome and we have some
11 serious questions and I simply suggest that perhaps
12 we have this discussion next week, I think it would
13 not take more than an hour or two next week and that
14 may be a more appropriate time and we may have a better
15 idea of how Phase II is going to proceed. I will
16 leave that with you, sir.
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THE COMMISSIONER: I'm sorry. You can leave it with me, but I don't understand it. Tell me what it is you are saying?

MR. YOUNG: I guess I am hopeful, sir, that we will have some sort of judgement from you by that stage.

THE COMMISSIONER: Nobody is going to pay any attention to my judgement, so what difference does that make?

MR. YOUNG: They liked your last one.

THE COMMISSIONER: No, they didn't.

MR. YOUNG: We did. I'm hoping that might limit some of the options if, in fact we know there is not going to be a full Phase II or there is not going to be a full Phase II until we hear from the Lieutenant Governor or the Divisional Court then, in fact, there is certainly an urgency if, in fact, you are going to proceed in a limited form, well, then, indeed we have to stress the issue at the time.

THE COMMISSIONER: Yes, Mr. Knazan.

MR. KNAZAN: I pose the question for the doctor. I have been sitting around waiting.

THE COMMISSIONER: You have something to say?

MR. KNAZAN: Subject to the answer that



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I thought were coming from Mr. Hunt and Mr. Young.
I guess I have exposed myself now.

THE COMMISSIONER: Are you, of all
people, going to be asking for standing?

MR. KNAZAN: No I was not. I was
anxious to hear --

MR. YOUNG: Should my friend have
approached me earlier I would have been happy to
explain this to him before.

MR. TOBIAS: Sir, I rise, because
it matters not to the people that aren't going to
be seeking standing when we have this argument. They
have obviously already determined they can get on
about their business after the conclusion of Phase I
but the people who do not automatically --

THE COMMISSIONER: I don't think it
really matters to Mr. Knazan. I don't quite understand.
If he is not going to be seeking standing --

MR. TOBIAS: That is precisely the
point, whereas the people who will or may be seeking
standing by proceeding right now on the basis that
you have outlined this morning are in a very very
difficult position and I suggested we may serve
everybodys interest by thinking about this a little bit
more and putting it off for a week or so.



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As you pointed out this morning, we are clearly going to be engaged in Phase I matters, at least for the next couple of weeks at the very minimum.

THE COMMISSIONER: No, I don't accept that at all.

MR. TOBIAS: Sir, if even we were to start argument next Monday morning.

THE COMMISSIONER: Yes, I see what you mean. Certainly if that is what you mean, but it is not that. I want to be able to, as soon as the argument was finished in Phase I which has always been my intention, to start Phase II. The only way we could do that is to proceed with the problems in Phase II as soon as possible. If you sought standing and I were to deny you standing then I don't see how I can proceed with the matters until the questions have been resolved and I don't want to be bound by this in the Divisional Court if you were determined to have a case stated.

MR. TOBIAS: I am keenly aware of that problem. All I am saying is that the question that we have to decide today is does the one week affect us.

THE COMMISSIONER: Yes, by one week.



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MR. TOBIAS: You have indicated quite strongly that once you make a ruling that you would expect anyone who wanted to state their case in the court to do so expeditiously. All I am suggesting to you, I think the one week delay doesn't --

THE COMMISSIONER: I will accept that argument. The next thing is do we want to ask questions and get the answers in camera from Mr. Hunt . Do you want to say something?

MR. LAMEK: I don't know whether you want to do that now or not. If you do I can tell you that the hearing room three is available right now.

THE COMMISSIONER: Well, why don't we then just get the statement. It will not be published by anyone, but we will at least have that so that people can think about it and we will reserve until after I have done whatever I am going to do which is going to be next week on the arguments we had this morning. All right? It won't be long. I wonder if there is another job available then. Court Room 3 is?

MR. LAMEK: Hearing room number three on the 21st floor.

THE COMMISSIONER: For anyone's benefit we are retired until 10:00 o'clock tomorrow morning, I'm sorry, 10:30 tomorrow morning.

---Whereupon the hearing was adjourned at 2:40 p.m. to an in camera hearing following immediately.



